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Supreme Court of the United States

OCTOBER TERM, 1934

No. 552

THE YOUNGSTOWN SHEET AND TUBE COMPANY, REPUBLIC STEEL CORPORATION, SHARON STEEL HOOP COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*

BRIEF FOR APPELLANTS

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April, 1935.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 552

THE YOUNGSTOWN SHEET AND TUBE COMPANY, REPUBLIC STEEL CORPORATION, SHARON STEEL HOOP COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al:*

BRIEF FOR APPELLANTS

Opinion Below and Reports of Interstate Commerce Commission

The opinion of the court below (R. 128-138) is reported in 7 F. Sup. 33. The court's findings of fact and conclusions of law appear at R. 138-148. The report of the Interstate Commerce Commission in the *Third Ex-River Case* (R. 23-46), in support of the order challenged by the petition in the instant case (R. 1540-1542) is reported in 197 I. C. C. 617. Other reports and orders of the Interstate Commerce Commission pertinent to the consideration of this appeal appear in the reports and in the record as follows:

First Report in Lisbon Case, 150 I. C. C. 43 (R. 50-65);
Second Report in Lisbon Case, 150 I. C. C. 619 (R. 65-71);
Report in *First Ex-River Case,* 163 I. C. C. 3 (R. 72-85);
Report in *Second Ex-River Case,* 185 I. C. C. 211 (R. 85-98).

Statutes Involved

The statutes involved are the Interstate Commerce Act, as amended, and Section 500 of Transportation Act, 1920 (49 USCA Section 142). The pertinent provisions of the Interstate Commerce Act, as amended, are Sections 1(5); 3(1); 14(1); 14(2); 15(1); 15(7); and 15(a)(2). (49 USCA Sections 1(5); 3(1); 14(1); 14(2); 15(1); 15(7) and 15(a)(2)). All these provisions appear in full in Appendix A, pages 143-147, *post.*

STATEMENT OF THE CASE

The question presented is the lawfulness of so much of an order of the Interstate Commerce Commission, dated December 5, 1933, as establishes and prescribes a minimum rate of 90 cents per ton for the transportation of ex-river bituminous coal[1] in carload lots from Conway and Colona, Pennsylvania, to Youngstown, Ohio, and immediately ad-

[1]The term "ex-river coal" means coal which is tendered to the rail carrier from river barges. The ex-river coal involved in the rate order challenged by this appeal originates at so-called "river mines", that is, coal mines having tipples upon the banks of the Monongahela, Allegheny or Ohio Rivers. There is no rail movement preceding the barge movement (see R. 207-208, 1007). As pointed out by the Commission (R. 77), and conceded by all parties, the water rates are not subject to the jurisdiction of the Commission.

jacent territory (R. 1540-1542). It reaches this Court on appeal from the final decree of a United States District Court, as specially constituted, dismissing the petition of these appellants to enjoin that order and set it aside (R. 148-149).

Three of the four appellants are manufacturers of steel at their plants situated in Youngstown, Ohio, and immediately adjacent territory, such territory being referred to herein as the "Youngstown destination group".[2] The remaining appellant is the Youngstown Chamber of Commerce. The Youngstown destination group is a large user of coal, including steam or industrial coal, coal for domestic use, and special purpose coal (or "coking coal") used in the manufacture of steel. Coal for the consuming areas in northeastern Ohio, including Youngstown,[3] is supplied by mines in the eastern and southern portions of Ohio as well as by mines in the "inner crescent" and "outer crescent" coal mining districts which extend southwestwardly in rough arcs from western Pennsylvania to eastern Kentucky and Tennessee.[4]

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[2]In the various proceedings before the Interstate Commerce Commission relating to coal rates in CFA territory (Central Freight Association territory), the coal consuming areas are referred to as "destination groups" and coal mining areas are referred to as "origin districts". See, for example, Exhibit F4, opposite R. 1384. CFA territory extends roughly from a line through Chicago and St. Louis on the west to a line through Buffalo, Pittsburgh and Parkersburg on the east, north of the Ohio River. See *Bituminous Coal to CFA Territory*, 46 I. C. C. 66.

[3]A map showing all matters deemed pertinent to the determination of this appeal is submitted separately as an appendix to this brief. It has been compiled by appellants from data appearing upon maps and charts which are in the record. The map is lettered along its vertical edges and numbered across its horizontal edges for purposes of ready identification of points hereinafter referred to.

[4]"As we have seen, the coal which reaches northeastern Ohio comes from mines within and without the State. Those within Ohio

In the making of steel, coke made largely from a high volatile bituminous coal is used. The nearest sources for the supply of coal of this type in quantities to the Youngstown group are the Pittsburgh and Connellsville coal origin districts in western Pennsylvania.[5] Prior to 1932 the large quantities of this type of coal used in the Youngstown group (R. 239-241, 1441-2) were transported all-rail via the main lines of the Pennsylvania, P. & L. E. and B. & O. railroads.[6] The great bulk of this coal was carried to Youngstown by the two carriers first named (hereinafter referred to as the trunk lines), whose lines parallel the Monongahela and Ohio Rivers for a distance of about one hundred miles from the Connellsville district through the Pittsburgh district to the northernmost point of the Ohio River north and west of Pittsburgh at Conway and Colona, Pennsylvania (Map, M-28) and thence follow the Beaver and Mahoning Rivers for a further distance of approx-

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are grouped in eight origin districts lying in the eastern and southern portions of the State. Those without Ohio lie in two rough arcs known as the inner and outer crescents. The inner includes the Pittsburgh district in western Pennsylvania contiguous to the Ohio River, the Connellsville immediately to the south, the Fairmont to the south of that, and eleven others to the southwestward through northern West Virginia, eastern Kentucky and Tennessee. The outer crescent is composed of districts extending in a wider arc eastward and southward of the inner crescent from the Altoona in Pennsylvania at the northeastern extremity to the Rathburn in southern Tennessee at the southwestern extremity. A map showing the area and location of the Ohio districts and most of those in the inner and outer crescents will be found in 46 I. C. C. opposite page 158." *Ohio* v. *United States*, 292 U. S. 498, 506-7. A similar map appears in this record at page 1386A.

[5]The coal origin districts in eastern and southern Ohio, which are as near or nearer to Youngstown than the Pittsburgh and Connellsville districts, do not supply this type of coal (R. 335, 1553).

[6]Ex-River rates were not put into effect until the Summer of 1932, (R. 27), prior to which time the movement of ex-river coal tonnage was negligible (R. 42, 27).

imately forty miles to Youngstown (Map, J-26).[7] The all-rail rates for such hauls are, and have been for many years, $1.34 per ton from the Pittsburgh district (an average haul of 99 miles) and $1.42 from the Connellsville district (an average haul of 142 miles) (R. 78).

Within the last decade, two circumstances have concurred to make it possible and feasible for the Youngstown group to secure water transportation, with its attendant low cost, for the first one hundred miles of the movement from the Connellsville-Pittsburgh districts to Youngstown: (a) The first circumstance was the expenditure by the Federal Government of more than $200,000,000 in establishing navigable channels in the Monongahela, Allegheny and Ohio Rivers.[8] As the map shows, this makes it possible for mines located along the Monongahela and Allegheny Rivers in the Pittsburgh and Connellsville coal districts to deliver coal from their river tipples into barges and to barge it north and west to points upon the Ohio River within forty miles of Youngstown, following exactly the same route for this hundred-mile trip as do the Pennsylvania and P. & L. E. on the all-rail trip. (b) The other circumstance was the development and adoption of the by-product coke oven. The coal for steel making is now transported to the steel mills and coked there, whereas formerly it was coked at the mines by the bee-hive process and the coke transported to the mills (R. 129-130). Coke does not lend itself to trans-

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[7]The line of the B. & O. from the Pittsburgh and Connellsville district to Youngstown (Map S-34 to J-26) does not follow the rivers for the first one hundred miles or more. It is a longer route, traverses mountainous terrain, and but a small portion of the coal to Youngstown is transported over it.

[8]As of June 1, 1932, the amount expended by the Federal Government for the development of water transportation in the Pittsburgh district alone exceeded $78,000,000 (R. 999).

portation by water, for the breakage incident to its handling impairs its usefulness; but such breakage and rough handling in water transportation are not disadvantageous in respect of coal intended for subsequent coking (R. 129, 51-52).

To enable the Youngstown industries to reap any of the advantage of this water route thus opened and made feasible for their use[9] it was necessary to secure adequate railroad service, and reasonable rates, for the forty miles separating Youngstown from the northernmost portion of the Ohio River.[10] Although, as has been seen, the all-rail routes of the Pennsylvania and the P. & L. E. parallel the Monongahela and Ohio Rivers for one hundred miles and then strike north and west for about forty miles to Youngstown, and the latter portions thereof are thus available as parts of a river-and-rail route for Connellsville and Pittsburgh district coal to Youngstown, yet "Ten years of negotiations, however, with the rail carriers for a river-and-rail route proved of no avail" (opinion of court below, R. 130).

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[9]The steel mills at Pittsburgh, Steubenville and Wheeling are located upon the banks of the Allegheny, Monongahela and Ohio Rivers and, since the opening of these rivers to commercial traffic and the development of the by-product coke oven, they have been placed in a highly advantageous competitive position, independent of rail carriers and high freight rates for their high volatile coal, such coal reaching them direct via barge from the river mines in the Pittsburgh and Connellsville districts (R. 129, 130). The effect of these developments upon the competitive situation of the Youngstown steel mills is reflected in the record. In 1913 the transportation cost of assembling material for the manufacture of one ton of pig iron at Youngstown was $2.38, and at Pittsburgh was $2.63. In 1918 these comparative figures had become $3.28 for Youngstown and $2.49 for Pittsburgh. In 1928 they were $4.44 and $3.11 respectively (R. 1043-1045, Report of Comm.). These competing mills also have water transportation for their products to the south and southwest via the Ohio and Mississippi Rivers (R. 51).

[10]The Beaver and Mahoning Rivers are not navigable. Youngstown cannot be reached by water from the Ohio River (R. 75).

Issues raised by further efforts to secure rail service for the transportation of coal from the Ohio River to Youngstown, and reasonable rates therefor, have engaged the attention of the Interstate Commerce Commission and the courts since 1928, culminating in this appeal; and have resulted in five reports by the Interstate Commerce Commission,[11] together with a decision by the court below in this case, which must now be reviewed briefly for a proper understanding of the issues presented on this appeal.

Lisbon Case—First Report of Commission, December 8, 1928

In 1928 the Lisbon Railroad[12] applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to construct branches from its existing lines to connect Youngstown with the Ohio River at Smith's Ferry, Pennsylvania—the latter being a point on the Ohio River south and slightly east of Youngstown and about twenty miles west of the confluence of the Ohio and Beaver Rivers (Map, N-27, R. 290). The Lisbon operates a short line railroad lying south of Youngstown and north of the Ohio River, and running east and west between New Galilee, Pennsylvania, and Lisbon, Ohio (Map L-28 to L-25). It proposed to build a branch north to Youngstown and a branch south to Smith's Ferry, which,

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[11]These are, in chronological order:
First Report in Lisbon Case, 150 I.C.C. 43, R. 50-65;
Second Report in Lisbon Case, 150 I.C.C. 619, R. 65-71;
First Ex-River Case, 163 I.C.C. 3, R. 72-85;
Second Ex-River Case, 185 I.C.C. 211, R. 85-98;
Third Ex-River Case, 197 I.C.C. 617, R. 23-46.

[12]The Pittsburgh, Lisbon & Western Railroad Company.

together with a small segment of its existing line,[12a] would constitute a line to carry coal from the river transfer point at Smith's Ferry to Youngstown. The application of the Lisbon was supported by the present appellants (R. 55) and opposed by the trunk line railroads (R. 58).

By its report of December 8, 1928 (R. 50-65; 150 I. C. C. 43, hereinafter referred to as *First Report in Lisbon Case*) the Commission[13] found that:

> "The evidence shows that it is practicable and desirable that the Youngstown district should have access to the Ohio River by rail line or lines which will afford them [sic] substantially the transportation advantages, *including rates,* proposed by the applicants in this case. The advantage of the utilization of the Ohio and its connecting waterways have been amply demonstrated and the rail carriers should realize that they cannot continue to handle by all-rail routes much traffic which can be more economically transported by all-water or rail-and-water routes". [Emphasis added] (R. 63-64).

The "transportation advantages, including rates", which would be afforded by the construction of a proposed line, were thus recited by the Commission its report:

> "* * * As indicating the probable effect of the new route upon transportation costs, it is stated that the present rate on coal from the Nemacolin mine to Youngstown by rail is $1.42 per ton, while by the use of the proposed route the cost may be reduced to approximately 90 cents per ton, made up of an estimated river cost of 30 cents per ton and the average rail cost of 60 cents per ton previously mentioned. * * *" (R. 56).

[12a] The segment of the existing line was to have been that portion between Negley, Ohio and Mill Rock, Ohio, a distance of 2.2 miles (R. 53, 270; see map L-26).

[13] Division 4, Commissioners Meyer, Eastman and Woodlock.

That the proposed Ex-River rail rate of 60c per ton, referred to, would be a remunerative rate, affirmatively appears from the findings of the Commission in the same report. The Commission in its report says:

> "* * * The applicant estimates that it would be able to earn an average of 60 cents per ton on its traffic as a whole, at which rate its gross revenue for the first year would be $1,200,000, increasing to $1,800,000 in the fifth year. Operating expenses are estimated at $850,000 in the first year, increasing to $1,115,000 in the fifth year, and net railway operating income at $300,000 in the first year, increasing to $595,000 in the fifth year" (R. 54-55).

These estimates the Commission found to be "reasonably supported" (R. 60). It thus affirmatively appears from the findings contained in the Commission's first report in the *Lisbon* case that ex-river coal could be transported from the river to Youngstown by a railroad constructed for the purpose and primarily dependent upon such coal for its revenues, at an estimated cost of 42c per ton in the first year of its operation, decreasing to 37.2c per ton in the fifth year after such new line had become settled and seasoned, and with a larger volume of traffic.[14]

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[14]These figures are determined as follows: With estimated gross revenues in the first year of $1,200,000, and estimated operating expenses of $850,000, the operating ratio in that year would be 71%. With estimated gross revenues of $1,800,000 in the fifth year and estimated operating expenses of $115,000, the operating ratio in the fifth year would be 62%. Applying these ratios to the rate of 60c per ton, at which the gross revenues were computed, produces an estimated cost of 42c per ton in the first year and 37.2c per ton in the fifth year. These calculations, it should be remembered, are based upon estimates found by the Commission itself to be reasonably supported. In its second report in the *Lisbon* case the Commission found that the same traffic could be handled at less expense by the trunk lines (R. 69) than by a new railroad primarily depend-

The Lisbon estimated the cost of the proposed line, including equipment, at $6,690,053 (R. 53). Its existing line was valued by the Commission as of June 30, 1918 at $661,450, since which time $100,000 have been expended for additions and betterments (R. 60). Adding these figures to estimated cost of the new line produces a maximum valuation of $7,503,000. Upon the basis of reasonably supported estimates of net operating income of $300,000 at the end of the first year and $595,000 at the end of the fifth year, at an average rate of 60c, it appears that at such rate the Lisbon would earn a trifle over 4% in the first year of its operation and 8% in the fifth year. The trunk lines estimated the cost of the new line at $8,600,000, which, with equipment [$1,664,200—R. 54] produce a total cost of $10,264,200, or with the addition of the valuation placed upon its existing line, a total in value of $11,067,650. Upon such valuation the estimated net railway operating income for the fifth year ($595,000—R. 55) would produce a net return of 5.4%. The Commission found that "an adequate line for the movement of the traffic anticipated could be constructed for an amount intermediate between the estimates submitted" (R. 59). This means that at the end of the fifth year, after such new line had become settled and seasoned and its traffic developed, it would be capable of earning, at well supported estimates of traffic and costs, a rate of return on all of the property of the Lisbon, including its old line as well as its proposed new

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ent thereon. Neither in the *Lisbon* case nor in any of the cases that followed, including the case in which the order challenged was entered, did the trunk lines offer any evidence as to the cost of the service on their lines. The Commission's findings in the *Lisbon* case, therefore, are the only findings as to the cost of this service. They have been permitted to go unchallenged and have never been withdrawn by the Commission.

one, a figure intermediate between 5.4% and 8%. It thus affirmatively appears from the Commission's own findings that at a rate of 60c per ton, the Lisbon, through the construction of a new line built primarily for the handling of coal between the river and Youngstown, and dependent largely, if not entirely thereon, could earn a fair, not to say handsome return upon its investment.[15]

As appears from the report, the principal objection of the trunk lines to the proposed new construction was "that the bulk of the expected new traffic would be diverted from rail lines now handling it." The Commission rejected this, finding, as previously stated, that public convenience and necessity required the provision of rail service on ex-river coal which would afford Youngstown the transportation advantages, including rates proposed by the Lisbon. The trunk lines further objected to the provision of such service and rates upon the ground that they would jeopardize the present rate structure. This the Commission answered by saying:

> "* * * The intervenors express fear that lower rates over a rail-and-water route will jeopardize the present rate structure, but, assuming such fear to be well founded, that fact would not justify us in withholding approval of any plan which promises to reduce substantially the cost of necessary transportation * * *" (R. 64).

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[15]In its second report in the *Lisbon* case the Commission found that the service in question could be provided by the existing lines not only at less operating cost but at a less capital cost as well (R. 69). Neither in the *Lisbon* case nor in any of the cases that followed (including that in which the order challenged was entered) did the trunk lines offer any evidence as to the value of that part of their property allocable to the service in question or of the rate of return thereon at any of the rates considered by the Commission in this series of cases.

The Commission, however, set the case for further hearing upon the question whether the use of the existing rail routes of the Pennsylvania and P. & L. E. from the Ohio River to the Youngstown district would be practicable for the ex-river haul, feeling that the use of such existing trackage would not only prevent an unnecessary duplication of facilities (R. 64), and shorten the river haul (R. 62), but that "The use of these lines between the Ohio River and the Youngstown district *at reasonable rates* would reduce the losses which the intervenors [the trunk line railroads] apprehend through the diversion of their traffic to the rail-and-water route proposed by the applicants" (Emphasis added) (R. 64).[16]

The Commission's finding, in this *First Report in Lisbon Case,* was, therefore, "that public convenience and necessity require the provision of rail transportation between the Ohio River and the Youngstown district, in connection with transportation on the Ohio River and connecting waterways; but that the record did not afford a basis for a conclusion that the rail service could not be satisfactorily furnished by existing lines" (R. 65-66).

Lisbon Case—Second Report and Order of the Commission, March 16, 1929

A few weeks later further hearings were held, resulting in a report and order by the Commission,[17] dated March 16, 1929 (R. 65-71; 150 I. C. C. 619, hereinafter referred to as *Second Report in Lisbon Case*), denying the applica-

[16]The Youngstown interests, including these appellants, stated that, in view of their previous experience with the trunk lines, they preferred the new route upon which they would have "the willing carrier" (R. 62).

[17]Division 4, Commissioners Meyer, Eastman and Woodlock.

tion of the Lisbon for authority to construct the line from Smith's Ferry, upon the representation of the Pennsylvania and P. & L. E. that they would provide adequate transfer facilities at Ohio River points, and adequate rail service therefrom to Youngstown, and would file "reasonable rates" for the transportation of ex-river coal to Youngstown (R. 65-71).[18]

This report points out that the Pennsylvania had announced its willingness to provide transfer facilities, and to accept ex-river coal for Youngstown, at Conway, Pennsylvania, a principal freight yard of the Pennsylvania located on the east bank of the Ohio River a few miles southeast of its confluence with the Beaver (R. 66, Map M-28); and that the P. & L. E. had announced its willingness to afford like facilities and transportation at Colona, Pennsylvania,[19] a station on its main line on the west bank of the Ohio River, opposite Conway, and about a mile north of it (R. 66; Map M-28); and the Commission found that adequate facilities and services could be so provided by these lines (R. 67).

While the Commission agreed with the trunk lines

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[18]"The pending application for authority to construct the line from Smith's Ferry will be denied with the understanding that rates will be filed by the trunk-line intervenors as proposed" (R. 71). In subsequent reports the Commission, in describing this ruling, said that it had denied the application of the Lisbon "on the representation of the respondents * * * that they would provide adequate facilities, service, *and reasonable rates* in connection with the transportation of ex-river coal, and with the understanding that the rates would be published immediately for our investigation and consideration" (R. 74), and, again, that the application of the Lisbon "for authority to construct extensions of its line between the Ohio River and Youngstown was denied on the representation of the respondents in the Youngstown case that they would provide adequate facilities and service *and reasonable rates* in connection with the transportation of ex-river coal" (R. 88). [Emphasis added.]

[19]The Black's Run yard, a then recently established freight yard of the P. & L. E., is located at Colona (R. 311).

that proper rates for such ex-river hauls could not properly be determined in the *Lisbon* proceeding (R. 68), it did comment upon ex-river rate of $1.02 tentatively proposed by the trunk lines to cover the line haul and terminal delivery, (but not the service of transfer from barge to car), —pointing out that the amount of the ex-river rate might well control the question whether facilities and services should be provided for a river-rail route (R. 68-69). As bearing upon the reasonableness of the proposed rate of $1.02, the Commission pointed out (R. 68-69) that:

> concededly "no regard was paid to cost of the service" in proposing it, and that while rate comparisons had been placed in evidence, "no evidence to justify any conclusion as to similarity of circumstances other than distance" had been adduced:
>
> that "the uncontroverted evidence offered by the applicant [Lisbon] at the original hearing supported the conclusion that transportation by the river-and-rail route could be furnished at a cost and at rates substantially below those for transportation over the all-rail routes";
>
> that the Lisbon had estimated its rate for the ex-river haul from Smith's Ferry as "within the range from fifty cents to seventy-five cents per ton, which would cover the cost of any deliveries by connecting lines";[20] and
>
> that "Whatever rates may be determined to be reasonable for the rail hauls, it is necessary to conclude that the services can be performed at less capital and operating costs by either the Pennsylvania or the Pittsburgh & Lake Erie than by the

[20] "In final argument counsel for the applicant [Lisbon] indicated his view that the rate for the rail haul should be approximately seventy-five cents" (R. 69).

> applicant by way of Smith's Ferry and the proposed new line. It is also probable that the service by way of Conway or Colona and the trunk lines could be more expeditious than by way of Smith's Ferry."

Neither the Lisbon nor the Youngstown interests offered any new evidence at the hearing which resulted in this second report, but again expressed their lack of faith in the cooperation of the trunk lines and their preference for the new route and the services of the willing carrier,—a position fully justified by their previous experiences with the trunk line railroads and destined to be confirmed by the subsequent actions of such railroads (R. 70-71). The Commission answered:

> "We must assume, however, that the trunk lines will provide adequate service *and reasonable rates* in connection with river transportation" [Emphasis added] (R. 71).

Accordingly, upon the representations of the trunk lines as above noted, the Commission found that the public convenience and necessity did not require the construction of the branch lines proposed by the Lisbon, and denied its application (R. 71).[21]

The First Ex-River Case (Youngstown)—Report and Order of the Commission, March 27, 1930

Thereupon, the trunk lines filed schedules, to be effective May 15, 1929, proposing to establish a proportional rate on ex-river bituminous coal in carload lots from Conway and Colona to Youngstown. Disregarding their under-

[21]Being negative, this order was not judicially reviewable. See *Piedmont & N. Ry. Co.* v. *United States*, 280 U. S. 469.

taking to propose a reasonable rate, the trunk lines by such schedules proposed the rate of $1.02 per ton (R. 73). The Commission suspended these schedules on its own motion and held hearings, in which these appellants participated, for the purpose of determining a reasonable rate. This resulted in a report and order on March 27, 1930[23] (R. 72-85; 163 I. C. C. 3, hereinafter referred to as report in *First Ex-River Case*). The Commission's ultimate finding was "that the suspended schedules have not been justified", and that "Upon full consideration of the facts of record, we are of opinion that a reasonable maximum rail-rate on this Ex-River coal would be 77 cents to Youngstown and points grouped therewith" (R. 84). The suspended schedules were therefore canceled "without prejudice to the filing of new schedules in conformity with the views expressed herein" (R. 84, 85).

The evidentiary findings of the Commission in support of its ultimate finding were as follows:

> *Conditions of the Ex-River Haul and Attendant Service.* That the lines of the Pennsylvania and P. & L. E. from Conway and Colona to Youngstown have a ruling grade of 0.3 of 1%, making it possible to move trains of 90 to 100 carloads in the winter and 100 to 115 carloads in the summer with a single train crew (R. 76); that coking coal will load 70 tons or more and domestic coal will average 56 tons or more, from Conway and Colona (R. 77); that with the facilities proposed to be erected by the carriers at Conway and Colona, and with their nearby yards, they can perform the switching services[24]

[23] By Division 5, Commissioners Lewis, Brainerd and Farrell.

[24] The proposed ex-river rate did not include the charge for transferring the coal from the barges to the cars, the carriers making an additional charge for this service (R. 75).

"more efficiently and at substantially less cost than is now generally performed by them at the mines for all rail movements" (R. 80); that the coal will likely move in train loads to the plants of appellant Youngstown Sheet & Tube Company, and of appellant Republic Steel Corporation, which concerns now receive 75% of the coal in the Youngstown district (R. 80); that while the proposed rate contemplates absorption of switching charges at Youngstown, there will be no switching charges on about 75% of the coal for the Youngstown district, and that switching charges on the remaining 25% will range from $2.70 per car to 19 cents per ton (R. 75, 80); that the proposed rate contemplates the return of empty cars to Conway and Colona (R. 75), but that there will be a substantial return tonnage south bound to points adjacent to Conway and Colona which will be loaded in open top equipment (R. 80-81); and that the facilities existing and to be constructed by the trunk lines are such as to permit "the expeditious rail movement of ex-river coal at the lowest possible cost of operation" (R. 76); that there is a very heavy movement of coal to the Youngstown destination group from the Pittsburgh and Connellsville origin districts, as well as from other origin districts (R. 77).

Rate Comparisons. Rate comparisons were offered by the trunk lines and by these appellants and are considered and reviewed in the report of the Commission. There was no finding by the Commission that the rate comparisons offered by the trunk lines relate to hauls under similar conditions, and it is the position of these appellants that the rate comparisons of the trunk lines were in no instance supported by any evidence whatever as to similarity of conditions. The Commission expressly found that the rate comparison especially relied upon by

the trunk lines was not applicable in central territory but related to much more difficult and expensive hauls.[24]

Earnings. The Commission found that, based on a weight of 70 tons per car, "a rate of 77 cents from Conway to Youngstown, 43 miles, would yield earnings of $53.90 per car, $1.25 per car mile, and 17.9 mills per ton-mile" (R. 84). It thus appears that with a single engine, moving trains of from 90 to 115 car loads (R. 76), the trunk lines can earn, at a rate of 77 cents, an average of more than $5,000[25] per train for a haul not exceeding 43 miles,

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[24]The trunk lines relied upon the fact that the $1.02 rate is the same as the maximum rate under the "Holmes and Hallowell scale" for distances of 40 to 50 miles for ex-lake bituminous coal from the head of the Lakes to destinations in the Northwest, including the Twin Cities. The only similarity between the conditions of such hauls and of the ex-river haul here at issue is that of distance, Conway and Colona being 41 and 43.1 miles, respectively, from Youngstown (R. 74). The evidence shows that at the head of the Lakes the average loading per car is under 40 tons (R. 701-702), whereas at Conway-Colona to Youngstown it is about 74 tons (R. 1456); trainloads from the head of the Lakes will run 4,500-6,000 tons maxima but require helper service for the first 30 miles, whereas from Conway-Colona one engine without helper service will handle 8,000-9,000 ton trains to Youngstown (R. 74, 200, 230, 698, 699). The Commission found the level of the rates in the territory for which the Holmes and Hallowell scale was prescribed "is substantially higher and the traffic far less dense than in central territory" (R. 84, 74). Rates generally in central territory are at 83.7% of the Holmes and Hallowell level (R. 81-82).

[25]This is at the rate of $120 per train mile. In the year 1929, in which 77 cents was fixed by the Commission as a reasonable *maximum* rate, the average earnings per train mile in the Eastern District were $9.25278. The earnings per train mile on this traffic at the rate of $120 were thus thirteen times such average. The record shows that such trains are moved between Colona and Youngstown and return "day in and day out within a eight hour day" (R. 312), and that the same favorable conditions obtain on the movement between Conway and Youngstown. As the Commission stated in the report of the *Third Ex-River Case:*

> "The Pittsburgh & Lake Erie . . . regularly hauls these heavy trains from Colona to Youngstown, delivers them,

and that return loads are available on a substantial part of the traffic.

In addition to their reliance upon rate comparisons in support of the $1.02 rate, as noted, the trunk lines asserted that the ex-river rate should not be such as to disrupt the all-rail coal rate adjustment in central territory, and that the Commission should give thought to fostering and preserving rail transportation as required by Section 500 of the Transportation Act (R. 75). But the Commission, adhering to the views on these points expressed in its first report in the *Lisbon* case, pointed out that the purpose sought to be attained by the establishment of any ex-river rates at all was the free movement of coal from river mines to Youngstown by water and rail in competition with coal from the same or competing origin districts on the all-rail rates, and that if this could not be accomplished, "there would be no movement of ex-river coal from Conway and Colona to Youngstown, even if respondents [the trunk lines] build their transfer facilities" (R. 78). The Commission further noted that there are a large number of iron and steel plants in central territory and some of them own coal lands along the Monongahela River in the western Pennsylvania coal districts, and that such mills desire to use the rivers as a means of transporting their own coal to Conway and Colona (R. 79). The Commission felt that the determination of a proper rate for the ex-river haul could not be made in disregard of the purpose and effect of

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picks up trains of empties as well as loads with the same train crews, and returns to Colona in eight hours. The service over the Pennsylvania from Conway to Youngstown and return is as favorable as that of the Pittsburgh & Lake Erie from Colona" (R. 33).

the ex-river movement[26]; and it determined the case by giving consideration "to the use of water facilities for the movement of traffic where available on the one hand, and rates for the rail carriers that will be *reasonably compensatory for the service they are required to perform* on the other"[27] [Emphasis Added] (R. 83-84). Giving effect to both these considerations, the Commission then proceeded to fix 77c, not as a merely compensatory, but as "a reasonable *maximum* rail rate" (R. 84) [Emphasis Added].

The Second Ex-River Case (Wheeling)—Report and Order of the Commission, May 31, 1932

For more than two years after the order of the Commission in the *First Ex-River Case* the trunk lines took no action to put into effect the 77c rate, or any rate, for the ex-river haul to Youngstown.[28] No rate at all was pub-

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[26]The Commission further stated that it must take into consideration the fact that there would be a charge for the river movement and for the transfer from barge to cars at Conway and Colona. No evidence sufficient to base a finding as to what these costs would be was given at this hearing (R. 77-78, 83-84). The water rates are not subject to the jurisdiction of the Commission (R. 77).

[27]The Commission noted that

> "It clearly appears that if rates are to be established on this ex-river coal which will induce its free movement from the river mines to Youngstown and points grouped therewith, they must not be any higher than the level of the all-rail rates from the same general producing districts, and that any ex-river rate which may be established must afford a basis for the subsequent establishment of rates from Conway and Colona to Cleveland, Canton, Toledo, and other large consuming points or for transshipment at lake ports to the head of the lakes, otherwise undue prejudice may be created" (R. 83).

[28]The order of the Commission in the *First Ex-River Case* had not directed that the 77c rate there approved should be made effective on or before a given time (R. 84-85).

lished until the summer of 1932, and then only under compulsion of the competition of ex-river rates filed by the Wheeling.[29] That road does not reach the Pennsylvania coal districts by rail but it had long been an important carrier of Ohio-mined coal to Cleveland, Lorain, Canton and Massillon and other destinations in northeastern Ohio, all further removed from the western Pennsylvania coal districts than is Youngstown. Between 1926 and 1931 the Wheeling had lost a large percentage of this coal business through the competition of coals from other districts moving to those destinations all-rail (R. 338-339), and, to offset this, it sought to participate in the movement of Pennsylvania district coals to northeastern Ohio by publishing schedules of ex-river rates of 95 cents to Canton and Massillon, and $1.10 to Cleveland and Lorain, to become effective June 22, 1931 from its Ohio River transfer points at Martins Ferry and Mingo Junction (R. 86).[30] The carriers having the all-rail hauls to those destinations, and five operators of inland mines[31] in the Western Pennsylvania and Northern West Virginia coal districts, intervened in opposition (R. 85, 89, 332). The Commission

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[29]The Wheeling and Lake Erie Railway Company.

[30]The rates were to be applicable from other adjacent river transfer points at which it was proposed to construct transfer facilities in addition to those existing at the points named (R. 86, 91). These Wheeling river transfer points are situated on the Ohio River from 46 to 64 miles south and east of Conway and Colona. The river haul thereto from the Pittsburgh and Connellsville districts is circuitous, being practically in the shape of a horseshoe (R. 89 and see map). In the *Third Ex-River Case* the Commission found that this circuitous river-and-rail route via the Wheeling river transfer points "requires total hauls to such destinations as Cleveland that are nearly twice those over the all-rail routes, and represent wasteful transportation" (R. 38). There is no such finding as respects the river-and-rail route from such districts via Conway and Colona, for that is in a direct line and parallels the existing all-rail routes.

[31]That is, mines having no river tipples.

suspended the schedules and held hearings, resulting in its report and order in the *Second Ex-River Case,* dated May 31, 1932[32] (185 I. C. C. 211; R. 85-99), cancelling the Wheeling's schedules.

The Commission's ultimate finding in this proceeding was

> "that the Wheeling's ex-river rates should not be on a level which would result in barge-rail rates from the Pittsburgh, Connellsville and Fairmont Districts to the considered destinations lower than the barge-rail rates based on the 77-cent rate to Youngstown under the findings in the Youngstown case plus the existing all-rail differentials to the same destination", (R. 97).

The finding and order were entered, therefore, without prejudice to the filing of new Wheeling schedules naming ex-river rates of $1.02 to Canton and Massillon and $1.27 to Cleveland and Lorain (R. 98), being 25c and 50c respectively over the approved 77c ex-river rate to Youngstown, (the established all-rail differential from Pittsburgh District to Canton and Massillon being 25c over the rate to Youngstown, with Cleveland and Lorain 50c over Youngstown. R. 96).

This ultimate finding of the Commission was not based upon a finding that the Wheeling's proposed rates were unreasonably low from a cost of service or revenue producing standpoint. While the Commission pointed out that the Wheeling's proposed ex-river rates differed from the 77c Youngstown rate in that the latter was a "maximum reasonable rate", while the Wheeling's ex-river rates were proposed as "reasonable minimum rates" (R. 89, 88), the Com-

[32]Division 4, Commissioners Meyer, Eastman and Mahaffie.

mission stated that the protesting carriers "do not seriously contend that the rates proposed are less than reasonable minimum rates or that they would cast an undue burden on other traffic" (R. 89). The protesting carriers could not have taken any other position in view of the evidence of cost studies introduced by the Wheeling which established that its proposed rates were substantially in excess of the costs of service on the proposed ex-river hauls and would earn it a fair return[88] (R. 88).

It should be noted in passing that the Commission's concurrence in the view that the Wheeling's proposed rates of 95c for hauls of 80 and 87 miles to Massillon and Canton and $1.10 for hauls of 147 and 150 miles to Lorain and Cleveland were not less than reasonable minimum rates, emphasizes its finding in the *First Ex-River Case* that the 77c rate found to be reasonable for the 40-mile haul to Youngstown was a maximum rate, more than merely compensatory. This is sharply brought out by the Commission's statement in this *Second Ex-River Case* that "the proposed rates [Wheeling's ex-river rates] are made on a level lower than that of the maximum reasonable rate of 77c prescribed to Youngstown, in order to offset the cost of the additional barge haul" (R. 89).

The report shows that the Commission's order in this *Second Ex-River Case* is based upon a finding that the Wheeling's proposed ex-river rates would upset or seriously menace the existing general rate structure on coal in

[88]It was developed that the Wheeling's costs per net ton for transporting ex-river coal from Mingo Junction, Ohio, a distance of 150 miles, to Cleveland would be 64.8c; a distance of 147 miles to Lorraine would be 62.5c; a distance of 87 miles to Canton would be 52.3c, and a distance of 80 miles to Massillon would be 50.8c (R. 410, 1232a). It would thus make a substantial profit on its proposed ex-river rates (R. 410, 411, 1232a).

central territory and were therefore unlawful. Said the Commission:

> "We are of the view that the establishment of the proposed ex-river rates would lead to a disruption of the all-rail rate structure on coal, not only from the Pittsburgh, Connellsville, and Fairmont and Ohio No. 8 districts to the destinations here considered, but to other points in central territory and from other coal districts, or that it would have marked effects upon the distribution and marketing of coal as between the river mines and the inland mines which latter must continue to pay the all-rail rates. In either of those events the revenues of some of the carriers and their ability to render satisfactory service would be impaired, and, in the alternative last mentioned, there is a possibility of the inland mines being practically shut out of the markets, at least as to by-product coal"[84] (R. 95-96).

The Commission announced that "to upset or seriously to menace a general rate structure lawfully established suffices to make proposed rates calculated to effect such a disruption unreasonable and unlawful" (R. 95), and referred to its "responsibility for railroad earnings in general under section 15 (a)" (R. 97). In support of this view of the law the Commission relied upon three of its own prior decisions (R. 95, 97) all decided prior to this Court's decision in *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*

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[84]In this report the effect of the ex-river rates upon the inland mines is not treated as constituting undue preference and prejudice as between persons and localities as it is in the Report in the *Third Ex-River Case* (R. 46), but that effect is treated as also establishing, together with the evidence as to the effect on rail revenue, that an unlawful disruption of the rate structure will be brought about by the proposed ex-river rate (R. 95-96).

(decided March 4, 1935) wherein this Court pointed out that a disruption of the rate structure without more "is no sufficient reason for prohibiting" a rate, at least without facts to indicate that such rate "will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy." Here the Commission did make a finding that the Wheeling's proposed ex-river rates, while compensatory (R. 89), would lead to such disruption in the rate structure as to impair the ability of competing carriers to render satisfactory service (R. 96), and it referred to testimony of the protesting carriers that the Wheeling's proposed rates would not merely take away the all-rail haul from the carriers now having it but would take the whole traffic away from them with serious consequences to their revenues[35] (R. 89, 90).

On the question of the legality of a rate which results in disruption of a rate structure, the *First Ex-River Case*, dealing with ex-river rates to Youngstown, is to be distinguished from the situation in the *Second Ex-River Case* which deals with the ex-river rates on the lines of the Wheeling. The Commission did not in the *Second Ex-River Case* question the soundness of the ruling, previously made by it in connection with ex-river rates to Youngstown, to the effect that a disruption of rate structure "would not

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[35]The Commission stated "That a large volume of the coal movement from mines along the Monongahela and Allegheny Rivers to the destinations here considered will be diverted from the all-rail routes to the barge-rail routes through the Wheeling's river division if the proposed ex-river rates become effective seems evident, unless corresponding reductions are made in the all-rail rates" (R. 95), and that the protesting carriers' contention that they would lose all the traffic to the Wheeling "appears to be based in part on the assumption that the ex-river rate found reasonable as a maximum in the Youngstown case from Colona and Conway will not be extended relatively beyond Youngstown" (R. 90).

justify us in withholding approval of any plan which promises to reduce substantially the cost of necessary transportation" (R. 64). The distinction between the cases is plain. In the *First Ex-River Case* the question was not that of establishing an ex-river rate which would give the rail traffic to railroads which theretofore had not handled it, but the question was that of fixing a reasonable rate for an ex-river haul which was being retained by the same carriers which had the all-rail haul, and the Commission fixed that rate at a reasonable maximum level of 77c (R. 83-84), with a purpose to compensate such carriers, in part, for such unavoidable loss of revenue as might occur through the participation of the water route and the river carriers, with their relatively low costs and rates, in the haul[86] (R. 64, 83, 84).

It is further to be noted that the Commission pointed out in its report in the *Second Ex-River Case* that the establishment of the rates proposed by the Wheeling would necessarily result in lowering the destination differentials long established for all-rail movements of western Pennsylvania and northwest Virginia district coals to northeastern Ohio points (R. 96). This circumstance appears to have influenced it in the fixing of the level of Wheeling ex-river rates which it would approve (R. 97). It may be noted, however, that the rates approved by the Commission in this

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[86]This distinction between the two cases—the one relating to the *maximum* rates from Conway-Colona and the other relating to the *competitive* rates of the Wheeling—was expressly recognized by the protesting carriers in the following passage in their brief in the *Second Ex-River Case:*

> "The issues here are wholly different from those in the Conway-Colona case, I. & S. Docket 3282, 163 I. C. C. 3, where the question was the quantum of the rate without a shifting of the traffic or a waste of transportation. Under the proposals here both the shifting and the waste will occur."

report left the river-rail charges for the movements via the Wheeling substantially below the level of all-rail rates between the same termini.[37]

Third Ex-River Case (Youngstown and Wheeling)—Report and Order of the Commission, December 5, 1933

July 16, 1932 the Wheeling put into effect the ex-river rates prescribed by the Commission in the *Second Ex-River Case* (R. 25). The P. & L. E. put the 77c ex-river rate from Colona to Youngstown into effect the same day (R. 1035), and the Pennsylvania put that rate into effect from Conway to Youngstown on November 30, 1932. Thus for the first time did the trunk lines put into effect the rate found to be a reasonable maximum rate by the Commission in the *First Ex-River Case* more than two years before, and establish a service found by the Commission to be required by the public convenience and necessity, and to be feasible, in the *First and Second Reports in the Lisbon Case* more than three years before.[37a]

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[37]This appears by inserting the $1.02 and the $1.27 rates in the appropriate places in the table appearing at the bottom of page 94 of the Record. The protesting carriers testified that 31c was the existing barge rate; the Wheeling testified to 45c. The Commission made no finding as between the two but made its tables upon both figures. At the 45c barge rate, the river-rail charge is the same as the all-rail rate from the Pittsburgh district, but less than the all-rail rates from the Connellsville and Fairmont districts. If the 31c rate be accepted, the barge-rail rate becomes substantially less than the all-rail rate from all three districts.

[37a]In anticipation of compliance by the trunk lines, one of the present appellants, Youngstown Sheet & Tube Company, had recently invested approximately $1,000,000 in the construction of a river tipple and cleaning plant at the Nemacolin mine owned by its subsidiary and located in Greene County, Pennsylvania, on the Monongahela River and in the Connellsville coal origin district. This mine has an annual capacity of approximately 2,000,000 tons of high volatile coal and more than two-thirds of its production is shipped to

November 26, 1932 the rail carriers affected petitioned for reopening and rehearing of both the *First Ex-River Case* and the *Second Ex-River Cases*. The petition was denied by the Commission without comment (R. 1510-1511). January 6, 1933 the carriers filed a second petition for rehearing and reopening which was granted by the Commission on May 2, 1933 (R. 1514). On such reopening, the *First Ex-River Case* (Youngstown) and the *Second Ex-River Case* (Wheeling) were consolidated for further hearing (*Third Ex-River Case*), the records of the earlier hearings made part of the record of the consolidated case, and additional testimony taken and additional exhibits introduced. The present appeal to this Court relates to the validity of the Commission's order on such further hearing, insofar as the order regulates the ex-river rates to Youngstown.

An appreciation of the limited grounds of these petitions for reopening and rehearing, and the limited scope of the trunk lines' contention and evidence at the reopened hearing, is pertinent to a proper understanding of the findings of the Commission in the report and order which resulted. Both petitions for rehearing were based solely upon the allegation that the 77c rate was too low because it threatened the general rate structure and the revenues of the trunk lines. Nowhere in the petitions is there an allegation that the 77c rate was unreasonably low for any other reason or in any other respect. No attack was made, from the standpoint of cost or value of service, or

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Youngstown. Appellant's investment in it is $19,000,000. It is of record that coal lands located upon the river have a much higher market value than lands of similar quality and quantity of coal located inland and that the interest, taxes, etc., upon the Nemacolin mine for that reason are about 50% greater than upon coal lands of equal quality and quantity located inland from the river in that district (R. 1034, 1035).

earnings, upon the finding made by the Commission in the *First Ex-River Case* that the 77c ex-river rate to Youngstown was a reasonable maximum rate. With a single exception, no new rate comparisons were offered.[38] There was no allegation of any change in conditions whatsoever affecting the ex-river haul or traffic,[39] and none was proved other than the obvious fact that ex-river coal had begun to move in considerable volume after the trunk lines had finally built transfer facilities at Conway and Colona and had put the ex-river rate into effect.

No evidence was offered as to the cost of the service or the value of the property devoted thereto, or to rebut the presumption arising from the Commission's finding in the *Lisbon* case as to the cost of the service or rate of return yielded thereby. In the petitions for rehearing, and in their evidence offered at the reopened hearing, the trunk lines proceeded frankly upon the view that the ex-river rates should be increased substantially to the all-rail basis for the purpose of preventing menace to the all-rail rate structure in Ohio and central territory and preventing encroachment upon the revenues of the rail carriers. The trunk lines introduced but a single traffic witness and his testimony was solely to the effect that the ex-river rate to Youngstown should be raised to the level of the all-rail rate in order to "protect the all-rail rate structure", and he proposed a rate of $1.01 for that purpose (Kern, R. 958; and see, also, R. 1007). At the conclusion of the hearings

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[38]The exception was a local rate for coal from the Leetonia, Ohio district to Youngstown under which only 8,779 tons of coal had moved in the years 1920-1932 to northeastern Ohio destinations whose total receipts from all origins in the same years were 225,000,000 tons (R. 1437-1440).

[39]It was alleged that "the conditions *affecting the railroads and their revenue needs* have very materially changed" (R. 1191).

the Examiner specifically asked counsel for the carriers whether their contention included any claim that the ex-river rate was too low on its merits or whether their contention was limited to the claim that it threatened the all-rail rate structure. Counsel asked leave to answer the question after the noon hour, and then answered, limiting the contention to the claim that the ex-river rate was unreasonable because it is "so low as to menace the all-rail rate structure."[40] In its report on the reopened hearing, the Commission thus stated the carriers' contentions:

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[40]The following colloquy appears in the original transcript of the proceedings before the Commission, which transcript was of record in the Court below (Exhibit 3) and is on file in this Court as an Original Exhibit with the certified record (R. 175, 177):
(page 164)

"Examiner Simmons: Mr. Orcutt, in I. & S. Docket 3619 I believe you stated on brief that it was not your contention that the ex-river rates proposed by the Wheeling were not compensatory, or that they would place an undue burden on other traffic. Your position there was that those rates would absorb the all-rail adjustment. Is that your position here?

Mr. Orcutt: As to that, of course, we could offer no evidence.

Examiner Simmons: In I. & S. Docket 3282 what is your position on that?

Mr. Orcutt: What was our position or what is it?

Examiner Simmons: What is it now since the 77-cent rate was established? There is no contention that it is too low, is there? Is your position the same as it is in I. & S. 3619, that they will absorb the all-rail adjustment?

Mr. Orcutt: I wonder if I could answer that after the noon hour? May I?

Examiner Simmons: You may.

* * * * * * *

After Recess.

Hearing resumed at 2:00 o'clock P. M.

Mr. Orcutt: Mr. Examiner, in answer to the Examiner's question before the noon recess, I would like to say that, as to the 77-cent rate to Youngstown, from Conway and Colona, the petitioning carriers consider it so low as to menace the all-rail rate structure. It is so far below a reasonable rate that it will and does menace the all-rail rate structure."

> "Petitioning respondents contend that the ex-river rates have in the past and do now seriously menance [*sic*] the comprehensive and important all-rail structure to Ohio and Central territory. They further contend that to continue ex-river rates on a basis lower than the all-rail structure will still further encroach upon their already depleted revenues." (R. 28).

In the petitions for rehearing and reopening the trunk lines asserted that the ex-river rates had already resulted in impairment of "the entire coal rate structure and carriers' revenues" (R. 1192) in that they were the cause of reduced intrastate rates on bituminous coal from Ohio mines to northeastern Ohio destinations (***not*** including Youngstown) which had been put into effect in August and September, 1932, upon order, or under the authority and permission, of the Public Service Commission of Ohio (R. 1547-1551, 1597). These reduced Ohio intrastate bituminous coal rates were under attack in a proceeding pending before the Interstate Commerce Commission at the time the second petition for rehearing in the *Ex-River Cases* was before that Commission for consideration; and the Interstate Commerce Commission granted the second petition to reopen and rehear the *Ex-River Cases* on the same date upon which it decided the Ohio Case (R. 1545). In the *Ohio Case* the Interstate Commerce Commission ordered the reestablishment of the higher intrastate rates formerly effective, finding that the reduced Ohio intrastate rates constituted an unjust discrimination against interstate commerce in a revenue sense and an undue prejudice against persons and localities in interstate commerce (R. 1591-1592). ***Intrastate Rates on Bituminous Coal Within Ohio,*** 192 I. C. C. 413, decided May 2, 1933 (R. 1545). A bill to

enjoin that order of the Interstate Commerce Commission was pending undetermined in a United States District Court at the time of the Commission's report and order in the *Third Ex-River Case* (R. 28). The order of the Interstate Commerce Commission in the *Ohio Case* was subsequently sustained by the District Court (*Ohio* v. *United States*, 6 F. Supp. 386, (January 6, 1934)) and by this Court (*Ohio* v. *United States*, 292 U. S. 498, (May 28, 1934)), solely upon the ground, however, that the reduced intrastate rates in Ohio worked undue prejudice against persons and localities in interstate commerce.

The chronology of the *Ohio Case* is important in the instant case not only as showing that it was relied upon by the trunk lines as establishing that the ex-river rates were disrupting the all-rail coal structure in central territory and were menacing the carriers' revenues, but because the report of the Commission in the *Third Ex-River Case* indicates that the *Ohio Case* influenced the Commission in accepting this contention of the carriers (R. 28). It is to be noted, however, that if the reduction in Ohio intrastate rates constituted a "disruption" of the all-rail structure caused by the promulgation of the ex-river rates, it turned out to be a disruption readily removable, not on the ground that there was a "disruption", but on the ground that the intrastate rates constituted undue prejudice against persons and localities in interstate commerce. 292 U. S. 498, 501-502.[41]

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[41] This forcefully illustrates this Court's recent ruling in the *Milwaukee* case (decided March 4, 1935, see *ante*, p. 23) that a disruption of rate structure, without more, is no sufficient ground for forbidding a rate in itself lawful and reasonable, since the entire situation is "subject to the power of the Commission" which is ample to "keep the changes within bounds".

The reopened hearing of the *Ex-River Cases* culminated in a report by the Commission[42] dated December 5, 1933 (R. 23-46) and an order dated the same day (R. 1540-1542) which is the object of attack upon this appeal insofar as it regulates the ex-river rate to Youngstown (*Third Ex-River Case*, 197 I. C. C. 617). The order required the establishment of an ex-river rate of not less than 90c from Conway and Colona to Youngstown, and rates not less than $1.20 and $1.45 from the river transfer points of the Wheeling to Canton and Massillon, and to Cleveland and Lorain, respectively.

The report and order of the Commission in this *Third Ex-River Case* are based solely upon a complete departure from the view of the law taken by it in its *First Report in the Lisbon Case*. They are not based upon any new evidence or any new finding as to the reasonableness of the then existing maximum ex-river rates, considered from the standpoint of the cost of the services or their ability to produce revenue. The report of the Commission repeats the findings of the prior reports as to the favorable operating conditions upon the ex-river haul to Youngstown (R. 33).[43] The Commission again refers to evidence of rate

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[42]Per McManamy, C.

[43]The Commission stated in the third report that "the services of switching, furnishing empty cars, and classifying the shipments at these transfer points [Colona and Conway] are not materially different from those performed at the mines" (R. 39) and "the present record shows clearly that the service rendered on ex-river coal at and from the river transfer points is identical with that on coal from local mines served by tracks similar to those at the river transfer points" (R. 43). These statements are merely to the effect that, given the same facilities, the railroad services at mines and at river transfer points are the same. There is no evidence that the mines have similar lay-outs to those at the river transfer points, and the Commission did not find that there was. The evidence is quite to the contrary (R. 385-387). "Mine run service" is slow and costly. The

comparisons, but again makes no finding (for there was no evidence) that the compared rates relate to hauls under comparable conditions (R. 32).

Nor was the order based upon any showing of a change in conditions, or new evidence as to the pertinent facts. The Commission does state "the facts presented on the present record are somewhat at variance with those shown in the original cases", since it appeared that not only coking coal but steam industrial coal was moved on the ex-river rates (R. 42). It is not perceived what difference it would make if that were the fact, but the record shows that it was brought out at the earlier hearings that it was contemplated that steam and domestic coal would move on the ex-river rates and the Commission on those occasions so found (R. 75, 77, 70).

The report and order of the Commission in the *Third Ex-River Case* are, in express terms, based upon two findings of ultimate facts only. These findings, and the evidentiary findings in their support, are as follows:

(1) "That the ex-river rates assailed are unreasonably low" to the extent that they are less than the amounts stated by the Commission (R. 45).

A bare ultimate finding "that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole." *United States* v. *Chicago, Milwaukee, St. P. & P. R.*

Commission has said that it is the slowest service measured by speed per hour of any freight service with the possible exception of way freight train service. *Lake Cargo Coal Rates*, 1925, 126 I. C. C. 309, 324. The above statements are the only ones in the report of the Commission in the *Third Ex-River Case* which in any way, even by implication, suggest that the ex-river haul to Youngstown and the services in connection therewith are not such as to make the business most profitable to the rail carriers, as found in the *First Ex-River Case*.

Co., 293 U. S. —— (decided March 4, 1935). As previously pointed out, there is no basis whatever in the report (or in the record) for construing this finding to mean that the rates are unreasonably low in view of costs, revenue return or value. The finding in the *First Ex-River Case*, that the 77c rate was a reasonable maximum in these respects, was left undisturbed. The only definite finding in the report of the Commission which can be considered as an explanatory finding in support of the ultimate finding that the assailed ex-river rates were unreasonably low is that "the record also fully establishes that the maintenance of the present ex-river rates has tended to disrupt the rate adjustment in this territory and jeopardized the revenues of the rail carriers. The view was expressed in the Ohio case that the difference between the ex-river rates and the all-rail basis of rates was too great.[44] The evidence indicates that the ex-river rates are too low and for that reason are unreasonable." (R. 45).

The grounds of this finding are also indicated, if further indication be needed, by the form of the order entered, *i.e.*, one fixing a *minimum rate* permitting advances (R. 1541), thus indicating a purpose to prohibit or restrict river rail movements and to protect the existing all-rail rate structure and revenues, rather than to fix a reasonable compensatory rate for an ex-river haul.

Apart from the reference to the rate comparisons, previously noted, the evidentiary facts stated

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[44]But in the Report in the *Ohio Case* the Commission added "That issue is not here presented" (R. 1570).

in the discursive part of the report in supposed support of this finding of ultimate facts, are merely to the effect that a large volume of bituminous coal moves into and through central territory and to consuming points in northeastern Ohio annually, and that this traffic constitutes a large percentage of the tonnage and accounts for a large percentage of the revenues of the Pennsylvania, P. & L. E. and B. & O. (R. 41); that ex-river coal will compete with the bulk of this (R. 41-42); that upon the establishment of ex-river rates substantial coal tonnages moved thereon (R. 42). The Commission notes that there is a charge of 12c fixed by railroad tariff for transferring the coal from barges to cars at Conway and Colona (R. 36). In respect of the barge charges, the report notes that a 30c charge was announced in the report in the *First Ex-River Case* and then refers to evidence indicating that such transportation might be had for as little as 25c (R. 36, 37-38); but the report expressly refrains from making a finding as to what the barge charges are, stating that it is unnecessary to the determination of the issue (R. 38).

In respect of the revenues of the rail carriers, the report merely notes generally, by reference to statistics of revenues and expenses of a portion of the Eastern District Class I carriers for the years 1921 to 1933, that the carriers have suffered a decline in revenues and in return on investments, especially "in the last few years" (R. 42-43). No facts are stated to show in what amount, if any, the revenues of the carriers involved in this case will be decreased as a result of the ex-river rate of 77c, and there is no finding, and no facts are stated to show, that those carriers, or any other carriers, will suffer a decline in net revenues or return as a result thereof.

(2) That the ex-river rates, to the extent that they are less than the amounts fixed as a minimum in the Commission's report and order "will constitute undue prejudice against operators of inland coal mines located in the Freeport, Pittsburgh, Connellsville and Fairmont districts, and undue preference of operators of mines located on the Monongahela, Allegheny, and Ohio rivers" (R. 46).

The evidentiary finding in support of this ultimate finding was that "the record establishes that the present ex-river rates have, in a great measure deprived the inland mines of their former markets in northeastern Ohio" (R. 45). In reaching this conclusion the Commission reasoned "the advantage of the location of the mines on the rivers in this territory have [sic] been enhanced by government expenditures in the improvements of these rivers for navigation. Whether these advantages should further be enhanced to the detriment of the inland mines by the establishment of ex-river rates so low as to eliminate the inland mines from competition merits careful consideration" (R. 44). The Commission thus completely missed the point that the only advantage to be derived by the river mines from their geographic location upon a navigable river (whether originally navigable or made so by government expenditures is immaterial) is the availability of water transportation, and that the only advantage of that is its low cost. The question was not whether the Commission should give the river mines a *further* advantage, but was whether the Commission has any authority to deprive the river mine of the whole advantage of its geographic position by fixing a rail rate ex-river in excess of a reasonable maximum rate.

The Decision of the Court Below

Separate bills were brought in the United States District Court by these appellants on the one hand (attacking so much of the Commission's order of December 5, 1933, as prescribed the 90c ex-river rate to Youngstown) and by those, on the other hand, who attack so much of the order as increased the ex-river rates from the Wheeling river transfer points. The District Court dismissed both bills for the want of equity, entering separate final decrees. The court ruled that the findings of ultimate fact were supported by the evidence, and that those findings supported the order. Your appellants have appealed from the decree dismissing their bill (R. 148). The complainants in the Wheeling case have not appealed.

SPECIFICATIONS OF ERRORS

A specification of such of the points raised by the assigned errors as are intended to be urged, is that:

1. The District Court erred in holding that the Commission did not misconstrue, misinterpret or misapply the law applicable to the subject matter involved in the proceeding before it, but gave proper consideration to and made proper interpretation of all applicable law, committed no error of law or irregularity in the making of the findings and order complained of, did not exceed its power and authority or act arbitrarily or in disregard of any legal right of the appellants or others, and that the order of the Commission was and is a valid exercise of its power and authority; and in not holding to the contrary; and in not further holding that the order of the Commission is void because based upon an erroneous interpretation of its powers and duties under the Interstate Commerce Act, as amended (I, II, III, IV, V, XIV, XV, XXIV, XXV, XXVI, XXXII, XLIII, XLIV, XLV, XLIX, L, LVIII, LIX, LX).

2. The District Court erred in not holding that the order of the Commission was void by reason of the fact that, in relating the ex-river rates of the carriers from Colona and Conway to Youngstown to the all-rail rates maintained by the same carriers on like traffic from the Pittsburgh district to the same destination, the Commission exceeded the powers and duties conferred upon it by the Interstate Commerce Act, as amended (II, VI, XL, XLII, LIX, LX).

3. The District Court erred in failing to hold that the Report of the Commission does not make the findings necessary to support, and essential to, the validity of the Commission's order (III, XIII, XVI, XXIV, XXVII, XLVIII, LIX).

4. The District Court erred in failing to hold that the Commission's report and order are not supported by substantial evidence (III, XII, XVI, XVII, XIX, XX, XXI, XXII, XXIII, XXVII, XXIX, XLVI, XLVIII, LI).

5. The District Court erred in holding that the alleged inconsistencies of the Commission need give it no concern, and in not holding that on the face of the report the Commission's order is invalid (XVI, XVIII, XIX, XX, XXI, XXII, XXIII, XXVI, XXVIII, XXXI, XLIX, L, LI, LIV).

6. The District Court erred in failing to hold as a matter of law that the Commission exceeded its powers in attempting to equalize the fortune, opportunities or abilities of the inland mines as compared with the river mines (IV, XI, XII, XIV, XV, XXXII, XLI).

7. The District Court erred in holding that the transportation of bituminous coal upon a maximum ex-river rate resulted in undue preference of shippers upon that maximum rate and in undue prejudice to competing shippers from inland coal mines, and in failing to hold that shippers paying a maximum reasonable rate cannot be held, in law, to be unduly preferred (IV, XIV, XV, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, LV, LVI).

8. The District Court erred in failing to hold as a matter of law, that the tests applied by the Commission in determining the unreasonableness of the existing ex-river rate from Colona and Conway to Youngstown, viz., (1) the claimed lack of harmony with, and danger to, the all-rail rate structure, and (2) the claimed prejudice to inland mines and preference of river mines, were insufficient to support the determination of the unreasonableness of any rate less than ninety cents; that such test or tests were arbitrary, unlawful and beyond the powers of the Commission to apply; and that any change of rate caused by the application of such a test or tests was arbitrary, unlawful and beyond the powers of the Commission to require (II, VI, VII, VIII, IX, XI, XXXVIII, XXXIX, XL, XLI, XLII).

9. The District Court erred in failing to hold as a matter of law that the test of the reasonableness of a rate between Colona and Conway and Youngstown could not be made the ability of that rate to provide competition between mines using water transportation from such mines to Colona and Conway and mines using all-rail transportation to Youngstown (VII, X, XL, XLI, XLII).

10. The District Court erred in holding that the existing ex-river rate is unreasonable because it fails to give the carriers an adequate return, and in not holding to the contrary (XXXVIII, XXXV, XXXVI, XXXIX, XLIII).

11. The District Court erred in failing to hold that the Commission's order, although in form within its delegated power, is so arbitrary and unreasonable as in substance and in fact not to be embraced within the power of the Commis-

sion under the Interstate Commerce Act, as amended (I, IX, LVII, LVIII, LIX).

12. The District Court erred in holding that the evidence contained in the re-opened and consolidated record by the Commission is summarized and in substance fairly stated in the three reports rendered by the Commission, and in not holding to the contrary (XLVII).

13. The District Court erred in failing to find that the order of the Commission complained of deprives appellants of their property without due process of law, contrary to the provisions of the Constitution of the United States, and particularly of the Fifth Amendment thereof (LVIII, LIX, LXI).

14. The District Court erred in holding that the order of the Commission complained of does not deprive appellants of the free and reasonable and non-discriminatory use of the navigable waters of the United States; and in not holding and concluding to the contrary (V, XLIII, XLIV, XLV).

SUMMARY OF ARGUMENT

Point I. In making its order the Commission departed from the standards of the Interstate Commerce Act, proceeded upon a misconception of its powers and duties, and exceeded its authority.

1. Analysis of the several reports of the Commission pertinent to the determination of the issues.

(a) Origin of the ex-river rates—purpose of their establishment—the proceedings leading up to the establishment by the Commission of 77c as a reasonable maximum rate and the conclusions to be drawn from the findings of the Commission and the record upon which based.

(b) The basis of the report in the *Third Ex-River Case* in which the 77c rate, theretofore fixed by the Commission as a reasonable maximum rate, was required to be advanced to a minimum rate of 90c.

2. In prescribing 90 cents as a minimum rate, unaccompanied by any finding that the existing rate was not compensatory or was so low as to cast an undue burden on other traffic, the Commission exceeded its powers.

3. The Commission was without authority to use its minimum rate power for the mere purpose of preventing the disruption of an existing rate structure.

4. The Commission was without authority to exercise its minimum rate power for the purpose of prevent-

ing or limiting the use of the rail and river route for the purpose, either of protecting the all-rail haul or relieving inland mines, dependent thereon, from the disadvantages resulting from such use by river mines to which such route was available.

5. Every postulate of law upon which the report and order of the Commission here challenged are necessarily based, as hereinbefore shown, has since been expressly rejected by the Commission in a report and order refusing to permit increases in reasonable maximum lake-cargo rail rates which were sought by the rail carriers upon the same grounds upon which the 90c ex-river rate was obtained in this case.

Point II. The "Rate Comparisons" referred to by the Commission, if intended by it as affording a basis for any definite finding in the report, are insufficient, as is the whole state of the record in respect of rate comparisons, to support a finding either (A) that the 77c rate would cause a "disruption of rate structure" in central territory, or (B) that the 77c rate is unreasonably low.

1. The general statements in the report in the *Third Ex-River Case* respecting rate comparisons and similarity of railroad services on the compared rates.

2. In both the *Third Ex-River Case* and the *First Ex-River Case* the reports disclose, and the uncontradicted evidence establishes, that road-haul conditions, maximum loadings, and terminal delivery services and expenses are extremely favorable to the railroads and permit of ex-river hauls to Youngstown at a minimum cost.

3. There is no statement in the report in the *Third Ex-River Case,* and no evidence whatever in the record, as to the conditions of the road haul, as to the volume of traffic, or as to the switching charges absorbed or the cost of terminal delivery service, in respect of any of the compared rates relied on by the Commission in the report in the *Third Ex-River Case.*

4. If the statements in the report concerning the similarity of railroad services rendered on the ex-river rate to Youngstown and on the compared rates are intended to mean anything more than that the assembly service at Conway and Colona is identical with that at any mine where the track facilities and tonnages are similar, then they are not supported by any evidence.

5. Rate comparisons based upon distance alone, as are those relied on by the Commission in its Report in this case, are utterly worthless. As shown by this record, any desired rate can be supported by such comparisons.

6. The rates referred to and relied upon as comparisons by the Commission in its Report are all local rates, although ex-river rates are in the nature of proportional rates and the Commission, in this Report and elsewhere, recognizes it as a principle of rate-making that proportional rates are made lower than local rates.

7. The Commission ignored the most apposite rate comparisons appearing in this record, *i. e.*, the proportional rates offered by these appellants, which clearly establish that the 77c ex-river rate is not unreasonably low and will not disrupt the rate structure.

Point. III. The Commission exceeded its powers and duties under the Interstate Commerce Act, as amended, in that it prescribed a minimum rate of 90 cents for the transportation of ex-river coal from Conway and Colona to Youngstown for the alleged purpose, among others, of eliminating undue prejudice and undue preference which did not exist.

1. In form, the order is not a Section 3 order.

2. In form, the order is a Section 15 order.

3. The Commission itself doubted its authority to remove the alleged undue preference and undue prejudice.

4. The power exercised by the Commission was that under Section 15(1) to establish a reasonable rate, the removal of the alleged undue preference and undue prejudice being a mere incident thereto.

5. Whether the order be a Section 3 or a Section 15 order, the standards for determining undue preference and undue prejudice are the same, such standards being those required to establish undue preference and undue prejudice under Section 3.

(a) The preference and prejudice, if any, are the result of geographical advantage and disadvantage.

(b) The preference and prejudice, if any, are not the result of the voluntary and wrongful act of the carriers.

(c) Dissimilarity of circumstances and conditions.

(d) The preference and prejudice, if any, do not result from a difference in rates which "is not justified by the cost of the respective services, by their values, or by other transportation conditions."

(e) The preference and prejudice, if any, cannot have resulted from the 77c ex-river rate which was established as a reasonable maximum rate and is shown by this record to be not less than a reasonable maximum rate.

6. The question presented in respect of undue preference and prejudice was, and is, not a question of fact for the determination of the Commission.

7. In any event, the evidence of record is insufficient to support the conclusion of undue preference and prejudice. Similarly, the findings of the Commission are insufficient to support its order in respect of undue preference and prejudice.

(a) The evidence.

(b) The Commission's findings.

POINT I

IN MAKING ITS ORDER THE COMMISSION DEPARTED FROM THE STANDARDS OF THE INTERSTATE COMMERCE ACT, PROCEEDED UPON A MISCONCEPTION OF ITS POWERS AND DUTIES, AND EXCEEDED ITS AUTHORITY.

1. Analysis of the several reports of the Commission pertinent to the determination of the issues.

(A) ORIGIN OF THE EX-RIVER RATES—PURPOSE OF THEIR ESTABLISHMENT—THE PROCEEDINGS LEADING UP TO THE ESTABLISHMENT BY THE COMMISSION OF 77C AS A REASONABLE MAXIMUM RATE AND THE CONCLUSIONS TO BE DRAWN FROM THE FINDINGS OF THE COMMISSION AND THE RECORD UPON WHICH BASED.

The statement of the case herein has demonstrated that a true appreciation of the purpose of the order here under review, and of the meaning of the report accompanying it, cannot be gained by considering that report *in vacuo*, divorced from the significant history of the prior proceedings before the Commission and of the Commission's four prior reports dealing with this matter.

The picture is presented in 1928 of the availability of water transportation facilities which place Youngstown but 40 rail miles from its sources of coal supply instead of from 100 to 140 miles therefrom. A river-and-rail route is proposed which parallels the all-rail route from the coal districts to Youngstown for the entire distance, and which involves no wasteful transportation; and a willing carrier (The Lisbon) seeks the permission of the Commission to

construct a new railroad from the river point to Youngstown and to invest its money in a road which would be dependent largely, if not wholly, upon coal traffic to Youngstown for its existence.

The trunk lines opposed the Lisbon application principally upon the ground that its construction would divert traffic from the all-rail routes (R. 60) and jeopardize the all-rail rate structure (R. 64). The Commission overruled both objections and found that

> "public convenience and necessity require the provision of rail transportation between the Ohio River and the Youngstown district, in connection with transportation on the Ohio River and connecting waterways." (R. 65-66.)

It further held that

> "the Youngstown district should have access to the Ohio River by rail line or lines which will afford them substantially the transportation advantages, *including rates*, proposed by the applicants in this case" (R. 63, emphasis added.)

The rate advantages referred to were the anticipated provision of a total transportation cost of 90c per ton (made up of an estimated river cost of 30c per ton and a rail cost of 60c per ton) from the Connellsville district, as compared with an all-rail rate of $1.42 per ton from the Connellsville district, and of $1.34 per ton from the Pittsburgh district. (R. 56.)[1]

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[1]As appears from the record, the Connellsville district and not the Pittsburgh district is the district of origin of the major portion of the high volatile or coking coal which, in turn, it was anticipated would constitute the larger part of the coal to be moved on ex-river rates (R. 29, 462, 1292A, 1292B).

The estimated gross and net revenues of the Lisbon under the 60c rate are thus stated in the report of the Commission:

> "The applicant estimates that it would be able to earn an average of 60 cents per ton on its traffic as a whole, at which rate its gross revenue for the first year would be $1,200,000, increasing to $1,800,000 in the fifth year. Operating expenses are estimated at $850,000 in the first year, increasing to $1,115,000 in the fifth year, and net railway operating income at $300,000 in the first year, increasing to $595,000 in the fifth year" (R. 54-55.)

These estimates the Commission found to be "reasonably supported" (R. 60).

It thus appears upon the face of the report that upon the basis of estimates reasonably supported, the cost to the Lisbon of performing the ex-river service would be 42c per ton in the first year and 37.2c per ton in the fifth year.[2] It also appears that at a rate of 60c per ton the Lisbon at the end of the fifth year would earn 8% upon its value, determined by adding to its estimated cost of the new line the valuation placed upon its own line by the Commission; or 5.4% upon its value, substituting the trunk lines' estimated cost of construction of the new line for that of the Lisbon.[3] The Commission found that the new line would cost a figure intermediate between the estimates of the Lisbon and the trunk lines, respectively (R. 57), from which is follows that the rate of return at the end of the fifth year would be between 5.4% and 8% at a rate of 60c. It thus ap-

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[2]For the derivation of these figures see statement pp. 9-10 *ante*, note.

[3]For the derivation of these percentages of rate of return see statement pp. 10-11 *ante*.

pears that a rate of 60c would yield to a new line, dependent almost entirely upon the movement of ex-river coal from river mines, a substantial profit from the start and a fair return to the end of the fifth year after its line had become settled and seasoned and its traffic developed. In other words, it appears from the findings of the Commission that a rate of 60c would be a fully remunerative rate to such a carrier, *i.e.*, one paying the cost of the service and a fair return upon the investment.

The Commission also found (R. 61) that public convenience and necessity would be better served if the ex-river service were provided by the existing lines, thus avoiding a duplication of transportation facilities and permitting the existing lines to reduce losses apprehended through the diversion of traffic from the all-rail route to a river-and-rail route (R. 61, 64). The Commission thus held that Youngstown was entitled to a reasonable rate based upon the service performed thereunder, by whomsoever such service was provided, irrespective of the resulting diversion of traffic from the all-rail routes or the effect thereof upon the carrier's rate structure. It laid down as the standard of reasonableness for such service, if performed by the trunk lines, that figure at which the traffic could be handled by a new line constructed for the purpose at a fully remunerative rate, *i.e.*, one which would pay the cost of the service and would bring a fair return upon the investment.[4]

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[4]In so holding, we believe the Commission properly interpreted its powers and duties under the Interstate Commerce Act, requiring that all rates shall be just and reasonable, and also under the duties imposed upon it by § 500 of the Transportation Act, declaring it to be the policy of the Congress to promote and encourage water transportation and to preserve in full vigor both rail and water transportation. Under the standards of the Interstate Commerce Act, it would appear that any rate higher than such a fully remunerative

That rate, as appears from the findings in the *Lisbon* case, was 60c per ton.

The trunk lines having expressed their willingness to provide ex-river service, the Commission upon further hearing, in which the attitude of the trunk lines was disclosed, denied the application of the Lisbon. In its second report, upon such further hearing, it made the further finding that such service

> "can be performed at less capital and operating costs[5] by either the Pennsylvania or the Pittsburgh & Lake Erie [the existing lines] than by the applicant by way of Smith's Ferry and the proposed new line" (R. 69).

The ultimate and incontrovertible conclusions to be drawn from the findings of the Commission in the *Lisbon* case, therefore, are (1) that a rate of 60c per ton would be fully remunerative for a new line constructed for the purpose of handling this traffic and dependent wholly thereon, and (2)

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rate would be unjust and unreasonable and could have but one purpose, *viz.*, a limitation or restriction of its use and of the consequent use of the river-and-rail route for the purpose of holding traffic to the all-rail route. Moreover, it would seem that under § 500 of the Transportation Act it is the duty of the Commission, when drawn to its attention in formal proceedings, to see that the rates to and from navigable waters, although fully remunerative to the carrier, are made with regard to their intrinsic reasonableness for the service covered thereby, irrespective of any resulting diversion of traffic from all-rail routes to water-and-rail routes, or of the effect upon the all-rail rate structure. The only possible purpose of a rate otherwise determined would be to discourage instead of promote the development of water transportation. § 500 does not contemplate that either water or rail service shall be preferred to the other, but that both shall be maintained, and clearly contemplates that the public shall have access to navigable waters at rates intrinsically reasonable, based upon the service covered thereby.

[5]By capital cost the Commission referred, of course, to the capital charge and not to the cost of construction of the existing lines.

that such service could be performed by the existing lines at a less operating expense and at a less capital charge.

Thereafter, in the *First Ex-River Case*, the Commission fixed 77c as a reasonable maximum rate on ex-river coal. This rate was 17c higher than the rate at which, it appears from the report in the *Lisbon* case, such traffic could be profitably handled at the start and at a fully remunerative rate of return at the end of five years.[6] The carriers offered no evidence as to the cost to them of performing the service or of the value of their property devoted thereto, from which the rate of return thereon at any rate contemplated could be computed. They offered no evidence to rebut the presumptions, arising from the Commission's findings in the *Lisbon* case, that the traffic could be handled at 42c by a green railroad, and at 37c by one whose condition more nearly approached that of the trunk lines, and that the trunk lines could perform the service at less transportation cost. The theory of the carriers in the *First Ex-River Case*, as evidenced by the report and the record, is that cost of service should be ignored, and that the rate should be fixed at such

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[6]In its second report in the *Lisbon* case the Commission refers to rates suggested by the applicant, ranging from 50c to 75c per ton, and to the fact that in final argument counsel for the appellant indicated his view that the rate should be approximately 75c (R. 69). The applicant offered no further evidence on the second hearing of that case (R. 70), nor did the Commission withdraw or qualify any of its findings as to the revenue yield of a 60c rate based upon estimates of traffic and earnings which had been found by the Commission to be reasonably supported. The deductions to be drawn from these findings are therefore unimpaired by the subsequent suggestion of the *Lisbon* that the rate might be made as high as 75c. Moreover, the rate fixed as a maximum reasonable rate was 2c in excess of this suggested rate, which, as appears from preceding discussion and that which follows, would have yielded the Lisbon not only a high rate of return at the end of the fifth year but a handsome rate of return at the end of the first year, on the basis of the estimated cost of construction referred to in the first report in the *Lisbon* case and the findings in respect thereof.

a figure as would protect the all-rail haul and the rail rate structure, for which purpose a rate of $1.02 (R. 73, 208) was proposed.[7]

The 77c rate, fixed as a reasonable maximum, was thus 40c higher than the estimated cost of transportation to the Lisbon at the end of the fifth year and 35c higher than its estimated cost at the end of the first year. The Commission, in addition to finding in the *Second Report in the Lisbon Case* that the traffic could be handled by the trunk lines at less expense, had found in the *First Report in the Lisbon Case* that the existing lines had additional capacity (R. 61). Moreover, since all-rail coal moves over precisely the same route from the river to Youngstown, it is obvious that, when handled by the trunk lines, such coal traffic forms only a part of the traffic carried by a highly developed railroad. In the absence of evidence by the trunk lines to the contrary, it is fair inference that the cost figure of 37c per ton, representing the estimated cost to the Lisbon at the end of the fifth year, after its railroad had settled and seasoned and its traffic had become developed, is more nearly representative of the trunk line cost in the first year than the higher figure.

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[7]While it does not appear definitely in the report that the purpose of this proposal was to prevent movement by the river-and-rail routes but only to prevent a disturbance of the general coal rate adjustment, it is apparent that its establishment would have effectively prevented any substantial movement by the river-and-rail routes and that such was the purpose of the trunk lines in submitting it. For the river portion of the movement the Commission in that case (R. 78) had assumed a rate of 30c a ton in the *Lisbon* case, both in its first and second report as it had in the *Lisbon* case. As subsequently appears, the carrier's rail rate, when established, did not include transfer for which the carriers made an additional charge of 12c a ton. It also appears that the river charges do not include insurance. Adding all these factors together, the rate of $1.02 proposed by the trunk lines in the *First Ex-River Case* would produce a rate of $1.44 river-and-rail, exclusive of insurance, as compared with an all-rail rate of $1.34 from the Pittsburgh district and $1.42 from the Connellsville district.

Besides which, we have the unchallenged finding of the Commission in the *Lisbon* case that the trunk lines could carry the traffic at less expense. The 77c rate established by the Commission as a reasonable rate, therefore, yields as a margin of profit an amount exceeding the cost of the service itself, resulting in an operating ratio of less than 50%, if the deductions inevitably to be drawn from the Commission's findings in the *Lisbon* case are to be given appropriate weight.[8]

As appears from the Commission's report in the *Lisbon* case, upon the basis of reasonably supported evidence, the net railway operating income of the Lisbon at the end of the fifth year was estimated at $595,000. This, as appears from the same report, is nearly 6% upon the value of that Company's property (adopting the higher construction estimates of the trunk lines) and approximately 8% upon the Lisbon's estimates, the Commission finding that the line could be constructed at a cost intermediate between the two. At an estimated cost of 37c per ton in the fifth year, the 60c rate would yield to the Lisbon a fully remunerative rate and a fair return on its investment. At 77c the amount of rate available for a return on the investment would be

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[8]It may be urged that in deriving an estimated cost in the manner in which we have derived it, based upon the Lisbon's estimates of traffic and earnings and of the Commission's finding that the same were well supported, we are dealing with estimates produced by a carrier not yet in operation. But the trunk lines, if unwilling to accept the deductions based upon such estimates, were in a position in the *First Ex-River Case* to produce figures as to the cost of moving traffic over this portion of their railroad, based upon their own experience, and in the *Third Ex-River Case* to produce cost figures based upon their actual experience in the handling of this very traffic. They have done neither. From their failure to do so, the inevitable presumption is that the cost to them of handling this traffic is at least as low as that derived from the formula which we have employed.

increased 17c from 23c to 40c, or 73%. Applying this percentage to the reasonably supported estimate of that carrier's net operating income at the end of the fifth year, it appears that a 77c rate would yield to the Lisbon in the fifth year of its operation a net railway operating income of more than $1,000,000, or over 13% upon the value of its line, as estimated by it, and over 9% upon the value of its line as estimated by the trunk lines, the true value being, as found by the Commission, at a figure intermediate between the two. The Commission found in the second report in the *Lisbon* case—a finding never challenged by the trunk lines—that the existing lines could handle the traffic at a less capital cost as well as at a less transportation cost. The conclusion is inevitable that the 77c rate prescribed by the Commission as a reasonable maximum rate yielded, during the period in which it was in effect, a rate of return upon the value of the trunk lines far beyond a reasonable rate of return and greatly in excess of the rate of return yielded by their traffic as a whole.

While, in the *First Ex-River* case, there were neither findings nor evidence as to the cost of the service, or the value of the carrier's lines, the report therein contains other findings from which the exceptionally low cost of this service and the high revenue yield of the rate fixed in that case as a reasonable maximum conclusively appears. The Commission found that the ruling grade between Conway and Colona and Youngstown was but 0.3 of 1%, and that it was possible to move coal in trains of from 90 to 115 carloads, according to the season (R. 76). It found that the evidence supported the conclusion that there would be a substantial amount of tonnage in open top equipment south bound (R. 80), thus reducing the empty car haul. It

further found that the switching service at the river transfer could be performed "more efficiently and at substantially less cost than is now generally performed by them [the trunk lines] at the mines for all-rail movements" (R. 80). It found that the 77c rate would yield earnings of $53.90 per car, $1.25 per car mile and 17.9 mills per ton per mile (R. 84), for a haul of 43 miles over a low grade, low cost of carriage line. It appears from the findings of the Commission that with trains of from 90 to 115 cars (R. 76) yielding car mile earnings of $1.25 per car (R. 84) the train mile earnings at the 77c rate range from a minimum of $112.50 in the winter months to a maximum of $143.75 during the remainder of the year, and produce a total train revenue in excess of $5,000. In the year 1929, when the record was made on which these findings and the order in the *First Ex-River Case* rest, the average train mile earnings of the lines in the Eastern District were $9.2537 per mile (Statistics of Railways in the United States, 1929, p. XLIX). The minimum train mile earnings on this traffic at a rate of 77c were thus nearly twelve times such average, and the maximum train mile earnings over fifteen times such average. Independently of the deductions to be drawn from the Commission's findings in the *Lisbon* case, it appears from the report in the *First Ex-River Case* itself that this traffic, capable of being handled in trainload lots of enormous length over a low-grade line, with a minimum terminal expense at the originating end, and at no greater expense at destination than if moved all-rail, was capable of being handled at the lowest possible cost per unit of traffic, and at such rate would yield exceptionally high revenue—in short, that, at the rate thus fixed, the traffic would be highly profitable to the carriers.

In view of all the foregoing facts, including the deductions to be drawn from the *Lisbon* case or without such deductions, we think it plainly appears that in prescribing a reasonable maximum rate of 77c the Commission fixed such rate at the very upper limit of the zone of reasonableness, if not above it.

(b). THE BASIS OF THE REPORT IN THE THIRD EX-RIVER CASE IN WHICH THE 77c RATE, THERETOFORE FIXED BY THE COMMISSION AS A REASONABLE MAXIMUM RATE, WAS REQUIRED TO BE ADVANCED TO A MINIMUM RATE OF 90c.

In the *Third Ex-River Case,* the Commission condemned the ex-river rate of 77c, theretofore prescribed as a reasonable maximum rate, and ordered such rate advanced to a minimum rate of 90c. Since no rate may be at the same time maximum and minimum, it follows that a maximum rate would be substantially higher and that the carriers were thus accorded the right to advance this rate to a substantially higher figure without violating the order of the Commission. As in the *First Ex-River Case,* the Commission made no finding, and no evidence was offered, as to the cost of the service or the relation of the condemned rate thereto or of the value of the carrier's properties devoted to such service, or of the carrier's rate of return under the 77c rate. In the absence of such finding or evidence, the Commission therefore could not have found and did not find that the 77c rate condemned as unreasonably low was either less than compensatory, or so unreasonably low, as to cast a burden upon other traffic. As appears from the

incontrovertible facts recited above, it was a highly remunerative rate, measured by any standard.[9]

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[9]In its report in the *Third Ex-River* case, in which the order challenged was entered, the Commission found:

> "* * * The loading of the cars of coal range as high as 70 tons. The Pennsylvania hauls 80 to 85 cars of 50 tons each from Conway to Youngstown with a single engine. Over the rails of the Pittsburgh & Lake Erie via which the ex-river coal moves from Colona to East Youngstown, (fol. 36) trains of 8,000 gross tons, the equivalent of 90 to 100 carloads per train, are moved during winter months. For seven months of the year trains of 9,000 gross tons, the equivalent of 100 to 115 carloads, are moved over that line. The Pittsburgh & Lake Erie has a multiple track of three-tenths of 1 per cent grade from Colona to Youngstown. It regularly hauls these heavy trains from Colona to Youngstown, delivers them, picks up trains of empties as well as loads with the same train crews, and returns to Colona in eight hours. The service over the Pennsylvania from Colona to Youngstown and return is as favorable as that of the Pittsburgh & Lake Erie from Colona." (R. p. 33.)

While the report, therefore, contains no findings as to the cost of the service, it contains affirmative findings confirming the findings theretofore made as to the highly favorable conditions under which this traffic is handled, making for extremely low cost. Its findings in this respect in the *First Ex-River* case were based upon anticipation. The foregoing finding is based upon actual experience. From this it appears that these lines handle this business in trains of enormous length with a single engine and also and that such engine and crew complete the round trip of loaded coal from the river to Youngstown and of empties accompanied by loads in the reverse direction, all within eight hours. It may be doubted whether there is any substantial tonnage in the United States handled under more favorable conditions or conditions making for so low a cost. We pointed out that at the time the 77c rate was established as a reasonable maximum rate, yielding per train mile earnings ranging from a minimum of $112.50 a train mile to a maximum of $143.75 per train mile according to the season, the average train mile earnings of the lines in the Eastern District were but $9.2537. At the time this rate was condemned as unreasonably low, the train mile earnings in the Eastern District had fallen to $7.60 (*Statistics of Railways in the United States* for the year ended December 31, 1933—Pamphlet Edition, S. 48). The low cost and highly remunerative character of this rate thus affirmatively appears.

This somewhat remarkable order, in which the Commission found that the rate theretofore prescribed as a reasonable maximum was 13c below a reasonable minimum, was made as a result of further hearing on the reopening of the case upon the petition of the trunk lines after the Wheeling had established ex-river rates from its river transfer points to certain other points in Ohio, in accordance with the Commission's order in the *Second Ex-River Case,* likewise reopened and consolidated with the Youngstown case for hearing. The principal ground of such petition was the alleged effect upon the rate structure and upon the movement all-rail (R. 1371, 1493). At the reopened hearing the trunk lines produced but a single traffic witness, who testified solely to the effect that the ex-river rate to Youngstown should be raised to the level of all-rail rates in order to "protect the all-rail rate structure" (Kern, R. 958; see also R. 1007). At the conclusion of the hearing a colloquy between the presiding examiner and trunk line counsel occurred, reproduced in a statement (p. 30, *ante*), from which it appears that the carriers made no contention that the 77c rate was too low except upon the ground that it was a "menace" to the "all rail rate structure." Even the carriers, with all the knowledge in their possession of the cost to them of performing the traffic at the 77c rate and of the rate of return yielded upon their investment thereby, did not contend that such rate was below a reasonable minimum, or even a reasonable maximum, gauged by the service which it covered, but requested that it be advanced for the purpose named.

The Commission thus fixed as a minimum rate a rate 50% higher than that at which, as appears in its findings in the *Lisbon* case, traffic could be handled at a fully remune-

rative rate by a new line of railroad constructed for the purpose, and at less cost by the existing line.

The first part of the report (R. 24-43) is a discursive recital of various facts appearing of record. This is followed by a "Summary" (R. 43-45) which is in turn followed by the Commission's ultimate findings, expressed in the language of the statute and constituting mere conclusions in themselves insufficient to support the order, unless accompanied by essential basic, or quasi-jurisdictional, findings of fact supporting such conclusions, *United States* v. *Chicago, Milwaukee, St. Paul and Pacific RR Co.* (March 4, 1935); *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore and Ohio R. Co.* (January 7, 1935); *Southern Pacific* v. *Interstate Commerce Commission*, 219 U. S. 433, 449.

The logical inference to be drawn from the physical make-up of the report, reinforced by the decision in the *Milwaukee* case, is that in the "Summary", following the discursive recital of various facts appearing of record and immediately preceding the Commission's ultimate conclusions, are to be found the "basic or quasi-jurisdictional facts" upon which such conclusions were based.

The Summary contains but three findings of fact:

> (1) "The present record shows clearly that the service rendered on ex-river coal at and from the river transfer points is identical with that on coal from local mines served by tracks similar to those at the river transfer points."
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> If by this it is meant that the service performed at river transfer points is identical with that at local mines having a similar track layout (*i. e.*, at which

coal is capable of being loaded in, and is habitually loaded in train load lots at the tipple), then the finding is meaningless. If on the other hand it is meant that the cost of the service at such river transfer points is identical with that performed at the multitude of mines from which all-rail rates apply to Youngstown, then it is not only unsupported by the evidence but contrary thereto and to previous findings of the Commission, made after exhaustive study of switching mine service and cost at the mines (pp. 101-102, *post*). Moreover, identity of service does not mean identity of cost or of the physical conditions affecting cost. There was no finding and no evidence either as to the relative cost of the ex-river service and the all-rail service from "local mines", whether located in the Pittsburgh and Connellsville districts, or elsewhere, or as to the comparative physical elements of the two. If by "identical" service it is meant that, whether the service is from local mines or river transfer points, it involves terminal receipt, line haul and destination delivery, it is meaningless. If it means more than this, it is altogether too indefinite to warrant any conclusion either as to cost or the surrounding physical circumstance affecting costs, and, if meant as a finding of identical cost, is unsupported either by other evidentiary findings with respect thereto or by any evidence bearing thereon. The carriers carefully refrained from offering any evidence either as to the relative cost or the relative transportation conditions encountered in the movement of ex-river coal as compared with the movement of coal from "local mines".

(2) "that the present ex-river rates have, in a great measure, deprived the inland mines of their former markets in northeastern Ohio." This situation the Commission says, it should "correct" (R. 45).

Obviously, the only way this situation could be effectively corrected would be by the establishment of ex-river rates which, when added to the river rates, would be so high as to preclude or restrict the use of the river and rail routes to the mutual advantage of the inland mine and to the all-rail routes. The report therefore contains incontrovertible internal evidence that the purpose of the Commission in prescribing a minimum rate in this case was to limit, if not prohibit, the use of the river and rail route. Only a rate which would have this effect would effectively "correct" the situation of the inland mine, which the Commission found to have been created by the prescription of a reasonable maximum rate, incontrovertibly highly remunerative to the carriers performing the service, for the movement of ex-river coal and designed originally to afford to Youngstown "the transportation advantages including rates" which would result from the construction of a new line to be provided to afford such service at such rates, and whose application was denied solely upon the ground that public convenience and necessity would be better served by the provision of the same service by existing lines at maximum rates not higher than those which, with due regard to cost of service and a fair rate of return, the proposed new line was prepared to accord.

(3) "that the maintenance of the present ex-river rates has *tended* to disrupt the rate adjustment in this territory and jeopardized the revenues of the rail carriers" (R. 45).

That a mere tendency to disrupt a rate adjustment, alone and without more, is not a sufficient justification for the exercise of the Commission's rate making power, was held by this Court in the *Milwaukee* case, decided subsequent to the order of the Commission under review.[10] The report (R. 41) refers to the extent and importance of the coal traffic. It does not, however, contain any finding as to the extent of the supposed threatened disruption of the rate structure thereon, or as to the proportion of such traffic, which would be affected thereby, or of "the extent of the expected loss" in gross revenues resulting from such "tendency" to disruption (compare *Milwaukee* case, p. 155, *post*). The report refers to the *Ohio* case and attributes the action of the Ohio Commission in reducing the Ohio rates to the establishment of ex-river rates.[11] This is the only concrete illustration of the tendency of such rates to disrupt the "rail

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[10]The opinion of the Court in the *Milwaukee* case is reprinted in full in Appendix B, pp. 130-140, *post*.

[11]Even if so, which is denied, there were no reductions in the Ohio intrastate rates on bituminous coal to Youngstown (R. 1545). The original Ohio reductions were made by the Public Utilities Commission of that State on complaint of certain coal consumers whose action seeking relief by way of such rate reductions long antedated the *Ex-River Rate* cases. The record shows that they did not file their complaints in Ohio with any reference whatever to the ex-river rates (R. 490-492). Moreover, the Commission's report in the *Ohio* case shows that the reduced Ohio intrastate rates were established on the basis of rates prescribed by the Interstate Commerce Commission itself for application in Illinois (R. 1563).

rate structure", which the report contains. Since the rendition of the report, this Court has sustained the action of the Commission in requiring an advance in the Ohio rates to the level of the interstate rates, thus affording a concrete illustration of the power of the Commission to keep within bounds the assumed demoralizing effect of a given rate, in itself unobjectionable, upon a rate structure.[12] The report not only contains no finding of fact of the extent of the expected loss in gross revenue to be anticipated as a result of such tendency, but no findings as to the impairment, if any, of net revenues. It may well be that, in view of the concededly highly remunerative character of the ex-river rates to Youngstown, the net earnings of the carriers, under such rates, are as great, or greater, than for the much longer haul over the all-rail routes at rates which, while producing more gross revenues, are materially less, distance considered, than the ex-river rates. Although evidence of the carriers' net earnings, all-rail and ex-river, was within the possession of the carriers, it was not offered. The Commission did not find, and there was no factual foundation for a finding, as to the effect of the tendency of the ex-river rates to disturb the rail structure, upon either

[12] *Ohio* v. *United States*, 292 U. S. 498. In this respect, the situation disclosed by this record is less favorable to the Commission than that disclosed by the record in the *Milwaukee* case. In that case, while there was no finding it did not appear that the rate was less than compensatory, or so low as to cast a burden upon other traffic, it did affirmatively appear that the rate was less than a fully remunerative rate. In this case, on the contrary, the rate condemned as unreasonably low was a rate prescribed by the Commission as a reasonable maximum and, measured by any test, was fully compensatory and highly remunerative.

> the gross or net revenues of the carriers appellee and hence upon their ability to provide adequate facilities and an adequate transportation service. Moreover, the rate comparisons referred to in the report show that there is no such thing as an homogeneous rate structure capable of disturbance. On the contrary, the only certain conclusion to be drawn from these rate comparisons is that rates for the same distances vary widely and are wholly inconsistent with each other (pp. 93-111, *post*).

The only finding in the report of changed conditions since the determination of the case originally, is as follows:

> "The facts presented on the present record are somewhat at variance with those shown in the original cases. There it appeared that the ex-river rates were designed for and probably would move only special-purpose coal used in by-product coke ovens. The present record shows that substantial quantities of steam industrial coal, including that used in the production of electricity, have been diverted to barge-rail routes." (R. 42).

In this the Commission erred.[13] The real significance to be attached to this finding, however, is not whether the commission erred in making it, but lies in the insight which it affords to the purpose of the order and to the conception of the Commission's powers and duties upon which based.

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[13]It appeared in the first ex-river case (R. 218, 77, 75, 70) that it was anticipated that steam coal as well as coking coal would move ex-river, if reasonable maximum rates were provided for ex-river service, and there is nothing in the report of the Commission in the *Lisbon* cases to indicate that the Lisbon expected the movement of coal over its line, if constructed, to be confined to coking coal. To the extent that the order is based upon this finding it is thus unsupported by the record.

There is no reason why steam coal as well as coking coal should not move at maximum reasonable rates. Shippers of steam coal, as well as shippers of coking coal, are entitled to the opportunity to use the river-and-rail route at a reasonable maximum rate for the ex-river service. Only if the Commission's purpose was to fix a rate which would preclude or restrict the use of the river and rail route in the interest of the all-rail haul, was the fact that steam coal was moving over such route, contrary to the Commission's expectations, pertinent as evidence of changed conditions affecting the action of the Commission.

The Commission did not find that the 77c rate was so low as to cast a burden upon other traffic. In the absence of evidence as to the cost of the service and particularly in view of the highly remunerative qualities of this rate it could not have made such a finding. It did not find that the rate was not fully compensatory for the service performed. It could not on the evidence have made such a finding, and for the same reason. Its purpose as disclosed by the report itself, was to limit and restrict, if not effectively to prohibit, the use of the river and rail route in the interest of the all-rail route and the inland mines dependent thereon, and to prevent a supposed threatened disruption of the all-rail rate structure without findings or evidence either as to the extent or consequences thereof. For this purpose it ordered the rate of 77c, theretofore prescribed, after full hearing, as a reasonable maximum rate, to be advanced to a minimum rate of 90c and to a figure 50% in excess of that rate, at which it had previously found the service could be performed profitably and at a handsome return by a substitute plant provided for the purpose. This it did without finding or inquiry as to the relation of either the 77c rate or the 90c rate to the cost of the service or to

the return yielded thereby. It is the contention of the appellants that the Commission, in so doing, departed from the standards of the Interstate Commerce Act for the determination of the reasonableness of either maximum or minimum rates, proceeded upon an erroneous conception of its powers and duties, and, while in form purporting to exercise its delegated powers, exercised the same in so unreasonable and arbitrary a manner as to constitute an abuse thereof and virtually to transcend the authority conferred upon the Commission by law. (Compare *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470).

2. In prescribing 90 cents as a minimum rate, unaccompanied by any finding that the existing rate was not compensatory or was so low as to cast an undue burden on other traffic, the Commission exceeded its powers.

The report contains the essential ultimate finding, expressed in the words of the statute, that the rates from Colona and Conway to Youngstown are unreasonably low, to the extent that they are less than 90c per ton. But this finding is a mere conclusion insufficient to support the order unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *United States* v. *Chicago, Milwaukee, St. Paul and Pacific RR. Co.* (March 4, 1935); *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore and Ohio R. Co.* (January 7, 1935); *Southern Pacific Co.* v. *Interstate Commerce*, 219 U. S. 433, 449.

In the absence of such findings the Court is "not called upon to examine the evidence in order to resolve opposing

contentions as to what it shows, or to spell out and state such conclusions of fact as it may permit" *United States* v. *Chicago, Milwaukee, St. Paul and Pacific RR. Co., supra; Florida* v. *United States, supra*).

The order of the Commission in this case, therefore, must be set aside unless the report contains essential basic findings from which it appears (1) that the rate of 77c theretofore fixed by the Commission as a reasonable maximum rate was unreasonably low for the service covered thereby; and (2) that any rate lower than 90c would be unreasonably low for such service.[1]

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[1]We are not unmindful of the fact that the Commission also found that the rate of 77c or of any other rate less than 44c under the contemporaneous all-rail rates from the Pittsburgh district, and less than 44c plus or minus present existing differentials from other districts of origin to Youngstown, constituted undue prejudice against the operators of inland mines, and undue preference in favor of river mine operators. It appears, however, from the report, and it is manifest on its face that the advantages enjoyed by the latter and the disadvantage suffered by the former under ex-river rates are due primarily to the availability of the river-and-rail route to the river mines, with a consequent lessening in their transportation charges as compared with maximum reasonable rates which the carriers are entitled lawfully to charge for movement from all-rail routes from the inland mines. The Commission was, of course, without power to equalize the opportunities of the river and inland mines respectively, or to deprive the river mines of the advantages resulting from their geographical location and their accessibility to rail-and-water service. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, *Ellis* v. *I. C. C.*, 237 U. S. 434, 445. If, as theretofore found by the Commission on a substantially identical record, the rate of 77c was a maximum reasonable rate, the river mines could not be unduly preferred, or the inland mines unduly prejudiced by its continued maintenance, whatever the effect upon the ability of the latter to compete with the former. Unless, therefore, the Commission's ultimate conclusion that the rate of 77c or any other rate less than that prescribed was unreasonably low is sustained by essential basic findings in turn sustained by evidence, its finding of undue prejudice and preference necessarily fails. Moreover, this finding, like the finding relating to the reasonableness of the rate, is a mere conclusion and as such insufficient to support the order unless supported by essential basic findings in turn supported by evidence.

The Commission is empowered to prescribe both maximum and minimum rates. The effect of the exercise of its maximum rate power is to preclude the carrier from charging any rate higher than that fixed as a reasonable maximum rate. It may charge less so long as the rate charged is within the zone of reasonableness, results in no undue prejudice or preference, and casts no undue burden on other traffic.

The effect of the exercise of the minimum rate power is to prohibit the carrier from charging less. It may charge more without violating any order made thereunder so long as the rate charged does not exceed a maximum reasonable rate.

The standards to be observed in the exercise of the maximum and minimum rate powers respectively are necessarily different. In the one case the Commission is fixing a rate above which the carrier may not go, and in the other a rate below which it may not go.

In *Bituminous Coal to Central Freight Association Territory*, 46 I. C. C. 66 (1917), the Commission said:

> " * * * The cost of transporting a commodity is an element properly to be considered in deciding what is a reasonable rate, but it is not necessarily determinative in all cases. Cost of transportation may be said to determine the *minimum* rate that may be charged as, on the other hand, the value of the service to the shipper marks the *maximum* of a reasonable rate or charge. * * * " (p. 112)

This order must be sustained, if at all, as an exercise of the minimum rate power. In *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 633, the Court said:

> "The evidence failed to show that the rates of the Texas & Pacific and the L. R. & N. on export and

> import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under § 15 (1) of the Act.***"

In the *Milwaukee* case, in setting aside an order which, in effect, was predicated upon the exercise of the minimum rate power,[2] the Court commented upon the fact that there was "no suggestion in the report that the rates" condemned by the Commission as too low, were "less than compensatory."

A finding by the Commission that the rate is either not compensatory or so low as to cast a burden upon other traffic is therefore a basic or quasi-jurisdictional finding essential to the exercise of the Commission's minimum rate power.

The rates condemned by the Commission in the *Texas & Pacific* case as unreasonably low and which were required to be advanced in the exercise of the Commission's minimum rate power were rates which had been established by the carriers. Similarly the rates condemned by the Commission in the *Milwaukee* case as unreasonably low and which were required to be advanced by it in the exercise of what, in effect, was its minimum rate power were rates which had been established by the carrier. The rate condemned in this case as unreasonably low and required by

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[2]It was claimed by the Commission and the Government in the District Court in that case that the Commission order was supported by its minimum rate power (8 Fed. Supp. 970, 974). The same contention was made by them in this Court. Moreover, it seems clear from a reading of the Commission's reports in that case (197 I. C. C. 245; 200 I. C. C. 609) that it, in operating under Section 15(1) of the Act, had in mind its minimum rate power.

the Commission to be advanced was a rate therefore fixed by the Commission as a maximum reasonable rate. The standards of the Act for the determination of a minimum rate, however, are and must be the same whether the rate under review is carrier-made or Commission-made. In either case the essential basic or quasi-jurisdictional findings must of necessity be the same. Moreover, the presumptions attaching to the compensatory character of a rate prescribed by the Commission, after full hearing, as a reasonable maximum rate are clearly stronger than those attaching to a rate made by a carrier. This is particularly true in this case where the highly remunerative and fully compensatory character of the rate condemned is established by the previous findings of the Commission itself in its former reports relating to the provision of reasonable rates for the performance of ex-river service. Not only did the Commission fail to make the basic and quasi-jurisdictional findings essential to the exercise of its minimum rate power but it proceeded to require the rate advanced to a prescribed minimum without any evidence whatsoever sufficient to overcome the presumptions as to the compensatory character of the rate thus condemned arising from its previous action and findings. Unless the Commission may pick out any rate and prescribe it as a minimum irrespective of any finding or evidence either as to whether it is compensatory or non-compensatory, whether it is so low as to cast an undue burden upon other traffic, or as to the relation between the cost of the service and either the rate condemned or the minimum rate sought to be established, the order under review may not be supported as an exercise of the Commission's power to prescribe a minimum rate.

Assuming, without conceding, that there may be exceptional cases in which the minimum rate power may be exer-

cised under other circumstances, this is not such a case. On the contrary, the incontrovertible facts hereinbefore reviewed raise the presumption that the 77c rate (nowhere rebutted), so far from being below a reasonable minimum rate, within the standards of the Act, was, as originally found by the Commission, a reasonable maximum rate within such standards. Moreover the incontrovertible facts in this case demonstrate that the order may not be sustained as an exercise of the minimum rate power on any rational theory. The whole theory of rate making and of the powers of the Commission in its exercise depends upon the theory that there is a zone of reasonableness within which any rate may be just and reasonable within the meaning of Section 1. Unless all distinctions between a minimum rate, a maximum rate or an absolute rate or fixed rate are to be ignored, it follows that a minimum rate must be substantially lower than that capable of prescription as a maximum rate and that when a minimum rate is fixed it follows that a materially higher rate may be charged as a maximum without subjecting it to a successful attack as such.

In this series of related cases, the Commission had found that the traffic in question could be handled by a new railroad constructed for the purpose profitably so as to yield a fair return on its investment at 60c per ton. From the findings so made it appears that the cost of the service would not exceed 42c per ton for such carrier in the first year of its operation and would be materially less if the service were performed by the existing lines. The lower limit of the zone of reasonableness, therefore, *i.e.*, that figure at which the rate would not be unduly low as compared with the cost of service, or cast an undue burden upon other traffic, is some rate which, while exceeding 42c per ton, falls far short of being fully remunerative. Notwithstanding this

the Commission has prescribed 90c as a minimum rate. How much higher the rate might be as a maximum and yet be confined within the zone of reasonableness, the report of the Commission leaves entirely to conjecture. Manifestly it may be materially higher unless all distinctions between a minimum rate and the considerations upon which based and a maximum rate and the considerations upon which based are ignored. The necessary effect of the Commission's order, when considered in the light of the uncontrovertible facts of record, therefore, is the creation of a zone of reasonableness as wide as the rate itself. If the rate prescribed as a minimum is more than double the probable cost of service, that rate which might be maintained as a maximum becomes so conjectural as to defy rational definition and the whole theory of a zone of reasonableness is reduced to an absurdity and transformed into a cloak under which the Commission may prescribe any rate, as either maximum or minimum, without regard to cost of service, rate of return or any other factor affecting transportation. If the order entered in this case may be sustained as an exercise of the minimum rate power then Congress, while in form creating rational standards for the guidance of the Commission in the exercise of its powers, has in fact conferred upon the Commission the power by administrative fiat arbitrarily to establish any rate it sees fit as either a maximum or minimum free from effective judicial review.

3. The Commission was without authority to use its rate making power for the mere purpose of preventing the disruption of an existing rate structure.

The rate order challenged by this appeal, and the report in its support, were announced by the Commission on De-

cember 5, 1933 (R. 23), during a period of time when it was laboring under the misapprehension that it had authority to use the rate making power for the purpose, without more, or preventing changes in rates, or rate structures or relationships. As shown by this record, it had announced, in deciding the *Second Ex-River Case* on May 31, 1932 (relating to the ex-river rates of the Wheeling), that rates which "would tend to precipitate changes in established rate structures which would be harmful to the public interest" were not justified (R. 97) and that "rates calculated to effect such disruption [are] unreasonable and unlawful" (R. 95)—citing three of its own prior decisions, without more, in support of this view of its powers. On November 8, 1933 in its original report in the *Milwaukee* case, relating to coal rates from Indiana to Illinois, it had assumed the exercise of the rate making power upon the sole ground that the continued maintenance of the rate therein condemned would tend to disrupt the rate structure to an undisclosed extent (197 I. C. C. 245); and on April 18, 1934, in its second report on that case, it had reiterated this conception of the law and of its power thereunder (200 I. C. C. 609). It was not until March 4, 1935, that this Court had occasion definitely to tell the Commission that it had no authority whatever to use such power to prevent a so-called "disruption of rate structure", without more. Meanwhile, on December 5, 1933, the Commission had again based its report and order, now under review on this appeal, upon the same erroneous conception of its powers and authority upon which its order in the *Milwaukee* case was based and which this Court has since declared to be incorrect. The decision of the court below in this case was also announced (May 12, 1934) prior to this Court's decision in the *Milwaukee* case. (R. 128.)

In the *Milwaukee* case a rate schedule filed by the Milwaukee Railroad reducing its rates for the transportation of bituminous coal from mines in Indiana to destinations in northern Illinois had been canceled by the Interstate Commerce Commission on the ground that the reduced rates would lead to a disruption of the rate structures in the Indiana and related areas, thus impairing the revenues of the carriers serving those areas and their ability to provide adequate and efficient transportation service. The reduced rates were not shown to be less than compensatory, but they were not maximum rates, being within the zone of reasonableness.

In concluding that prevention of a disruption of the rate structure, without more, is not sufficient justification for the exercise of the rate making power, this Court said:

> "At the very least the finding should inform us, if only approximately, of the extent of the expected loss. They should make it clear whether the impairment of revenues would be trivial or substantial, for only thus can the impairment be related to capacity for service."

The Court further pointed out that findings were lacking as to whether "the existing rate relation is intrinsically sound and fair", or whether other rates which might be affected by the reduction of the rate under review are sound and fair. Moreover, the opinion points out, "the whole situation is subject to the power of the Commission, which may keep the changes in bounds," *i. e.*, by preventing any resulting changes in other rates if such changes violate any provision of law.

The *Milwaukee* case is fundamental and controlling on the question now under discussion. The finding relied upon by the Commission in this case is that the maintenance of the then existing ex-river rates "has tended to disrupt the rate adjustment in this territory and jeopardized the revenues of the rail carriers". As in the *Milwaukee* case, there is no finding as to the extent of such disruption, present or anticipated, or of the effect thereof upon the gross or net revenues of the carriers or upon their ability to render adequate service and provide adequate transportation facilities. As in the *Milwaukee* case, findings are lacking as to whether "the existing rate relation is intrinsically sound and fair". Moreover, so far as appears from the rate comparisons contained in the Commission's report, there is no such thing as an homogeneous rate adjustment in the territory in question. As in the *Milwaukee* case, "the whole situation is subject to the power of the Commission which may keep the changes in bounds" as it did in the *Ohio* case, the only specific instance which the report contains of the supposed tendency to disruption resulting from the maintenance of ex-river rates to Youngstown.

In so far, therefore, as the order is predicated upon the tendency of the then existing ex-river rates to disrupt the rate structure or disturb existing rate relationships, it is predicated upon an erroneous conception of the Commission's powers and duties. It is, we think, plain from the report that such was the primary basis of the order. This is apparent, not only from the importance apparently attached to this finding but from the fact that the case was reopened upon a petition for rehearing, based primarily upon allegations of such a tendency. As appears from the

report itself, it was upon this ground, and this ground alone, that the carriers sought an advance in the Youngstown rate. As appears from the record, it was upon this ground, and this ground alone, that the carriers, upon such rehearing challenged the existing rates as being unreasonably low. As appears from the report on which the order was based, and from the report in the *Second Ex-River Case*, the Commission, at the time that the order was made, was proceeding upon the theory that the existence of such a tendency was sufficient to support the exercise of its minimum rate power for the purpose of arresting it.

There may be no doubt that, whether the sole basis for the order or not, the Commission was strongly influenced by this misconception of its powers and duties. Except therefor, it may be doubted whether the order would have been made. This being so, the order should be set aside on this ground alone. The Court is not called upon to speculate whether, if uninfluenced by this misconception of its powers, the Commission would have made the same order upon other grounds. This clearly was one of the main grounds, if not the main or sole ground, upon which the order is predicated. This being so, the order should be set aside.[1]

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[1]It may be contended that Section 15a (2), enacted June 16, 1933, authorizes the making of an order based merely on threatened disruption of rate structure. This Court, however, has held that, in the absence of evidence in the record and findings in the report indicating that the rate under attack is less than compensatory, or that capacity for service to the public will be impaired or put in jeopardy, there is nothing in Section 15a (2) to support such an order. *Milwaukee* case.

4. The Commission was without authority to exercise its minimum rate power for the purpose of preventing or limiting the use of the rail and river route for the purpose, either of protecting the all-rail haul or relieving inland mines, dependent thereon, from the disadvantages resulting from such use by river mines to which such route was available.

That such was the purpose of the Commission is evidenced by the concern expressed by the Commission over the effect of ex-river rates upon the inland mines and its declared purpose to "correct" this situation. Such correction could be accomplished only by such an advance in the ex-river rates as would prevent or restrict the use of the river and rail route. That it was the purpose of the Commission to restrict the use of such route is also evidenced by its finding that steam coal was moving river and rail contrary to the Commission's anticipations. This finding constitutes the only finding of changed conditions which the report contains. The necessary inference is that the Commission attached weight to this so-called change. It could have attached weight thereto only upon the theory that the Commission should protect the all-rail haul by limiting the use of the river and rail route as much as possible.

The Commission in its report says (R. 36) that:

> "It is difficult to compare the all-rail rates with the total through charges on traffic that moves ex-river without accurate information as to the charges to and at the ports."

Having made this declaration, the Commission then proceeds at length to review the evidence concerning the charges for the water service and to compare the resulting river-and-rail

rates with the all-rail rates (R. 36-38). The river rates are not subject to the jurisdiction of the Commission. Nor, in prescribing either a maximum or minimum rate for ex-river service was the Commission concerned with the resulting effect upon the total river-and-rail charge as compared with the all-rail rate. Such a comparison is in no wise pertinent to the determination of an ex-river rate, either maximum or a minimum. The fact that the Commission thought it was is further evidence of the fact that it was not engaged in an effort to fix either maximum or minimum rates for ex-river service, according to the standards of the Act, but actuated by a desire to get such ex-river rates high enough to restrict movement via the river-and-rail route and force the traffic by artificial means to the all-rail routes. Otherwise it would not have been so concerned with the rates for the water service or with a comparison of the total charges for river-and-rail service with those applicable all-rail.

The Commission did not stop with the prescription of a specific minimum rate. It went further and provided, by its order, that ex-river rates for the future should not be less than 44c below contemporaneous all-rail rates from the Pittsburgh district to the same destinations and not less than 44c plus or minus, as the case might be, under the existing differentials over or under the all-rail rates from other districts of origin. By tying the ex-river rates up in this manner to the all-rail rates, the Commission again made it plain that it was not considering the *quantum* of the ex-river rate, either from the standpoint of cost of service or of any other factor having a conceivable bearing upon the prescription of a minimum rate, but was seeking, under the guise of the minimum rate power, to restrict the movement of ex-river coal by the fixing of such ex-river

differentials. At the same time, it left the carriers free to make the ex-river rates as much higher than the prescribed minimum, as the carriers might choose, subject only to the limitation imposed by the law itself that such higher rate might not exceed a reasonable maximum. Only a moderate advance over the prescribed minimum would be required to kill off the water-and-rail route entirely.[1]

The remarkable and highly unusual character of the order whereby the Commission fixed as a minimum a rate 13c in excess of that which it had so recently established as a maximum, particularly in view of the incontrovertible facts as the highly remunerative qualities of the rate concondemned, calls for some explanation. That explanation is to be found in the purpose evidenced in the foregoing to make the rate so high as to preclude or restrict the use of the river-and-rail route. The purpose of the application of the Lisbon was to make possible the use of a river-and-rail

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[1]The river rates referred to in the report range from 25c to 45c (R. 36). At the lowest of these rates, the combined rate for river-and-rail service at the prescribed minimum (90c), including the transfer charge (12c—R. 36) will be $1.27, as compared with a rate of $1.34 all-rail from the Pittsburgh district and $1.42 from the Connellsville district. The river rates do not include insurance, the amount of which is not disclosed either by the record or by the evidence. Moreover, there are advantages incident to a more expeditious rail haul performed without transfer as compared with a river and rail service involving transfer. Eliminating the tangible element of insurance and the intangible element of the superiority of rail service, it thus appears that an advance of but 7c in the ex-river rate, from a prescribed minimum of 90c to a maximum rate, would be necessary to make the river-and-rail rates as high as the all-rail rates from the Pittsburgh district, and an advance of but 17c to accomplish the same result from the Connellsville district. It is hardly conceivable that rates so slightly over the minimum could be condemned by the Commission as being in excess of a reasonable maximum. Under the guise of exercising its minimum rate power, the Commission has, therefore, created a situation whereby it has put it in the power of the trunk lines to kill off the river-and-rail service entirely.

route through the provision of ex-river service at a rate reasonable for such service when measured by the customary tests of reasonableness, *i. e.*, cost of service and rate of return. The purpose of the trunk lines from the beginning has been to prevent the use of such route for the purpose of protecting their all-rail hauls. At the outset, the Commission held that the public was entitled to the advantages, including rates, which the Lisbon was prepared to afford, irrespective of the resulting diversion of traffic from the all-rail routes or threatened disruption of the rate structure. The report of the Commission, upon which the order under review rests, constitutes a complete about face. The Commission now says that the public is not entitled to such rate advantages, or to a rate no higher than one intrinsically reasonable for the ex-river service itself, because more coal is moving, or is likely to move, over such route than the Commission thinks ought to move and because the rate adjustment may be disturbed by the continued maintenance of ex-river rates. Consequently, it announces its purpose to advance the rate so as to limit the use of the river-and-rail route in the interest of the all-rail route and the inland mines dependent thereon. But the Commission, consistently with the standards of the Act, may not use its rate-making powers for any such purpose.

The public may not be required to pay a high rate over one route for the purpose of forcing movement over another.

Section 500 of the Transportation Act provides in part

> "It is hereby declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection

with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

The powers and duties of the Commission must be construed in the light of this declared policy as well as by a consideration of the Interstate Commerce Act.

Wholly independent of this section we think that the statement of the case herein has demonstrated that a true appreciation of the Commission's conception of its powers and duties under which the order was made and the purpose of such order, and of the meaning of the report accompanying it, cannot be gained by considering that report *in vacuo* divorced from the significant history of the proper proceedings before the Commission and of the Commission's four prior reports dealing with this matter and the findings which they contain.

This section does not contemplate that either rail or water transportation shall be preferred to the other but that both shall be fostered and preserved. It does not require the Commission to establish rates to or from navigable waters which will require the carriers to handle traffic from and to such waters at less than a fully remunerative rate in order "to promote, encourage and develop water transportation service and facilities in connection with the commerce of the United States." On the other hand, it clearly prohibits the Commission from establishing a rate to or from such navigable waters substantially higher than a fully remunerative rate, (*i.e.*, one which pays the cost of service and a fair return thereon), in order to discourage the use of the waterway and to promote the use of all-rail routes as opposed to water-and-rail routes. An adjustment of rail rates to or from navigable waters for this purpose is incon-

sistent with the policy of Congress to promote, encourage and develop water transportation and to foster and preserve both rail and water transportation, and is consistent only with a purpose, contrary to that declared by Congress, to favor transportation by rail at the expense of transportation by water and to deprive those adjacent inland points of the use of water and rail routes at a reasonable total charge therefor.[2]

Neither the carriers nor the Commission can be heard to say, in the light of the conclusions logically flowing from the Commission previous findings as to the cost of performing this service, the rate of return yielded to a new line at a rate as low as 60c, the highly remunerative character of the rate of 77c first fixed and the failure of the carriers to offer any evidence to rebut the presumptions arising therefrom, that the 77c rate fixed as a reasonable maximum rate was other than highly remunerative for the service performed, if not in excess of a reasonable maximum rate. In requiring its advance to a minimum rate of 90c, without further inquiry or concern upon the part of the Commission as to the cost of the service, the value of the property devoted thereto or the rate of return thereon, the Commission was plainly not attempting to prescribe a rate, either maximum or minimum, within the standards of the Act, but to fix a rate, the effect and purpose of which was to limit the

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[2]The record shows that the use of the river-and-rail route, with an ex-river rate of 77c, will save Youngstown a maximum of 28c on transportation costs of its coking coal, whereas its several competitors located on the river banks in this territory save from 53c to $1.02, being the difference between the all-rail rate and the river cost (R. 1045-1046, 1458). The 28c saving for Youngstown is the difference between the $1.42 all-rail rate from the Connellsville District and a total river-and-rail charge of $1.14, made up of the 77c ex-river rate, a towing charge of 25c and a 12c transfer charge, but not including any item to cover water insurance cost.

use of the river and rail route. It frankly said so when it said that the rate should be advanced so as to permit the inland mines to move coal all-rail.

It will no doubt be contended that, while such may be the effect of the order, its purpose was to remove undue prejudice against the inland mines and undue preference in favor of river mines. But the disadvantages under which the inland mines suffered were due to their geographical location, being inaccessible to the cheaper river and rail route. The advantages of the river mines on the other hand were due to their geographical location and the availability of the river and rail route to them. Differences in position due to geographical location cannot be made the predicate of a finding of prejudice or preference. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 47; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.

If the 77c rate had been shown to be less than a reasonably compensatory rate, or, indeed, less than a fully remunerative rate, the inland mines might have had some cause for complaint. The Commission could then be accused of seeking to encourage water transportation at the expense of rail transportation. But there was no such showing. There was not even inquiry as to the compensatory character of the rate. As we have said before, we think that it appears from the incontrovertible facts in this case that in prescribing 77c as a reasonable maximum rate, the Commission fixed that rate at the very upper limit of the zone of reasonableness, if not above it. If so, the inland mines could not complain whatever the effect upon their business. The truth of the matter is that, while the order purports to be based in part upon a finding that the rate is unreasonably low (meaning, of course, from a transportation standpoint) and in part upon a finding of undue prejudice against the

inland mines, the latter cannot stand unless the former is supported. This is so because no person can complain of the effect upon his business of the continued maintenance of a reasonable maximum rate available to his competitor.

In prescribing a minimum rate of 90c for the purpose of preventing or restricting the use of the rail-and-river route in the interest of the all-rail route and of the inland mines, the Commission exceeded its power under the Interstate Commerce Act, failed to give due heed to the policy of Congress as declared by Section 500 of the Transportation Act, and acted in so unreasonable and arbitrary manner as to exceed its delegated powers.

5. Every postulate of law upon which the report and order of the Commission here challenged are necessarily based, as hereinbefore shown, has since been expressly rejected by the Commission in a report and order refusing to permit increases in reasonable maximum Lake Cargo rail rates which were sought by the rail carriers upon the same grounds upon which the 90c Ex-River rate was obtained in this case.

This appears from the Commission's decision, dated February 20, 1934 in *Pittsburgh Coal Producers' Association* v. *Ashland Coal & Iron Railway Company*, which appears in full in this record at pages 1604-1621. That case, and the Commission's decision therein, were as follows:

In *Lake Cargo Coal Rates*, (1925) 126 I. C. C. 309, the Commission in 1927 entered an order requiring that rates on bituminous coal in carloads from mines in the Pittsburgh, Ohio No. 8 and Cambridge districts to lower Lake Erie ports for transshipment by vessel, be reduced to reasonable maximum figures prescribed in that order. In

January, 1933, certain rail carriers, including the B. & O., Pennsylvania and P. & L. E., applied to the Commission to vacate or modify the 1927 order. The applications were based upon three contentions:

(a) that the reduced lake-cargo rail rates from the mines to the lower Lake Erie ports, prescribed by the 1927 Commission order, should not apply to coal for transshipment by lake to Michigan and Canadian ports east of Lake Michigan (R. 1606);

(b) that these lake-cargo rates should not apply on coal transshipped by vessel from one Lake Erie port to another or on coal for local delivery in the port of transshipment (R. 1607-8); and

(c) that the lake-cargo rates should be raised 30 cents in order to prevent the further diversion of all-rail tonnage to the lower peninsular of Michigan and to northern Ohio, western Pennsylvania and New York, and to remove a threat to the all-rail competitive adjustments to those destinations (R. 1607).

The petitions to vacate or modify were denied. The Commission construed its 1927 order as intended to make the lake-cargo rates applicable to coal for transshipment from the lower Lake Erie ports to destinations on Lake Huron and adjacent waters; construed it as not intended to make those rates applicable on coal for local delivery in the lower Lake Erie ports or on coal for transshipment from one such port to another; and refused to sanction an increase in the quantum of the lake-cargo rates upon the ground that such rates, as established as reasonable maxi-

mum rates in its 1927 order, "are not shown to be less than reasonable maximum rates" (R. 1620).

The last mentioned ruling is of interest in the present controversy, for it shows that the Commission there took a view as to the applicable standards of law which is directly opposite to the theory of law which it necessarily applied in entering the order complained of on this appeal. As ground for an increase in the lake-cargo coal rate, the rail carriers asserted that coal dealers in the lower peninsular of Michigan receiving their coal on all-rail routes were at a disadvantage as compared with other dealers in that locality receiving their coal via rail-lake routes and that, consequently, "the present rates on lake-cargo coal are threatening to disrupt their all-rail rate adjustments to this territory" (R. 1616), and the low cost of the lake shipments was instanced. The rail carriers contended that the increased movement of lake-cargo coal to the lower peninsular of Michigan and the resulting diversion of tonnage from the all-rail routes to points in that territory were chiefly due to the reduced lake-cargo rates prescribed by the 1927 Commission order. The Commission admitted that such reduced rates "no doubt contributed to that result" (R. 1616), but stated that the essential question was whether the lake-cargo coal rates were then less than reasonable maximum rates. Said the Commission:

> "Our order requires the maintenance of the rates therein prescribed as reasonable maximum rates. Obviously, therefore, a proposal by petitioning defendants to establish any higher rates on traffic destined to those four points, under a finding to the foregoing effect, could not be justified in the face of the lower rates required by our order to be maintained as reasonable maximum rates on traffic des-

> tined to other points beyond the ports of transshipment, unless these rates are now less than reasonable maxima. In the final analysis, therefore, the essential question is whether, as alleged in the supplemental petition, the rates which our order requires to be maintained are now less than reasonable maximum rates" (R. 1615).

And the Commission laid down the following rule which is directly applicable to the case now at bar:

> "However, if the present lake-cargo rates are not less than reasonable maximum rates for the transportation service performed thereunder, the fact that they may have been one of the causes of the diversion from the all-rail routes to these points is not a valid ground for vacation of our order and an increase in these rates * * *" (R. 1617).

Taking up then the question of the evidence as to whether the lake-cargo rates were less than reasonable maximum rates, the Commission noted that the carriers introduced evidence to show that they were lower than rates for local or track delivery from the same mines to other ports, and actually or relatively lower "distance alone considered" than local rates on bituminous coal for comparable or greater hauls from the Ohio and Crescent districts to destinations in Ohio, Indiana and Michigan, and from the Pittsburgh and other districts to destinations in New York, Pennsylvania and Ohio, "many of which have been prescribed or approved by us"; and that it also appeared that the lake-cargo rates were substantially under the local rates from the same mines to the Lake Erie ports. The Commission found all this evidence insufficient, stating that it was inconclusive "because of differences in circumstances and conditions attending transportation under

the two classes of rates" and because the record "contains no evidence such as the relative cost of transporting lake-cargo coal and of coal for local or track delivery to these ports" upon which to predicate a finding (R. 1618).[1]

Referring to evidence of the carriers comparing the rail-lake rates and charges with the all-rail rate, the Commission held that it was insufficient to establish that the lake-cargo rate was less than a reasonable maximum rate, stating:

> "The fact that the rates on lake-cargo coal from the mines to the lake ports, in combination with the handling charges and rates for the transportation by water to destinations beyond the ports, are less than the all-rail rates to such destinations from the same mines is of little, if any, probative value in determining whether the lake-cargo rates are less than reasonable maximum rates. There is a total lack of similarity in the character of the transportation performed under these two classes of rates in so far as the water haul is concerned. Moreover, contract carriers generally perform the latter haul, and their charges, being a matter of negotiation, are subject to considerable fluctuation especially for the shorter hauls beyond the ports of transshipment" (R. 1619).

In this decision, which was announced two and one-half months to the day after the entry of the order chal-

[1]As demonstrated in Point II (pp. 93-118, *post*), the rate comparisons in the record in the instant case are based upon similarity of distance only, there being neither evidence nor finding as to the relative cost of transportation on the ex-river hauls as compared with such cost on the all-rail hauls, and neither evidence nor finding as to the circumstances and conditions attending transportation upon the ex-river hauls as compared with the circumstances and conditions on the all-rail hauls.

lenged on this appeal, the Commission has accepted the very theories of law which, we contend, should have been applied to the determination of this case and which, if applied, would have resulted in sustaining the 77c ex-river rate. Thus the Commission in the *Lake Cargo Case* announced that, unless it were shown that the previously established reasonable maximum proportional rate was, in fact, less than a reasonable maximum, judged by the "transportation services performed thereunder", the fact that it was one of the causes of the diversion of traffic from all-rail routes "is not a valid ground for vacation of our order and increase in these rates". With respect to the contention of disruption of rate adjustments, the Commission held the carriers' rate comparisons to be insufficient since they were based on considerations of distance alone,—just as are the comparisons involved in the present case. Moreover, the Commission remarked that there was no evidence as to the relative costs of the services upon the proportional rates and upon the compared rates, and announced that "differences in circumstances and conditions attending transportation under these two classes of rates" must be taken into consideration (R. 1618).[2] These are the very things which it failed to take into consideration in the instant case. Again, it announced that the difference between the all-rail charge and the rail-lake charge was of no value as showing that the rail-rate to the lake is less than a reasonable maximum rate.

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[2]While the present record establishes that ex-river rates are in the nature of proportional rates (R. 959-960, 1002, 35, 80), yet the rate comparisons submitted and chiefly relied on by the trunk lines in the instant case are local rates (see pp. 103/112, *post*). As shown by the discussion in the text above, such local rates were found by the Commission in the *Lake Cargo Case* to afford no proper basis for a comparison with proportional rates.

Commissioner McManamy, who wrote the report of the Commission in support of the order in the *Third Ex-River Case,* which is now under review in this Court, was a dissenter from the report of the Commission in this subsequent *Lake Cargo Case* (R. 1616).

Thus it appears that the Commission has now definitely rejected every basis or theory of law upon which its decision of the instant case can be deemed to rest.

POINT II

THE "RATE COMPARISONS" REFERRED TO BY THE COMMISSION, IF INTENDED BY IT AS AFFORDING A BASIS FOR ANY DEFINITE FINDING IN THE REPORT, ARE INSUFFICIENT, AS IS THE WHOLE STATE OF THE RECORD IN RESPECT OF RATE COMPARISONS, TO SUPPORT A FINDING EITHER (A) THAT THE 77c RATE WOULD CAUSE A "DISRUPTION OF RATE STRUCTURE" IN CENTRAL TERRITORY, OR (B) THAT THE 77c RATE IS UNREASONABLY LOW.

That part of the report preceding the summary and containing a discursive review of many matters of record recites, among others, certain rate comparisons. No conclusion in respect of these rate comparisons is made in the summary. Nor, except to the extent that they may be regarded as a predicate for the Commission's findings that the existing rate tended to disrupt the rate structure, does it appear from the summary or the report what effect such rate comparisons may have had upon the Commission's findings and order. The rate comparisons offered by the railroads and referred to in the report are a miscellaneous lot of local rates, themselves showing great incongruity and inconsistency in the rate adjustment, the only fact bearing upon the circumstances and conditions of transportation being that of distance alone. There was neither evidence nor finding as to similarity of transportation conditions surrounding the compared rates and the ex-river rates. As the Commission found, the ex-river rates cover the movement of coal in trains of unusual length handled over a practically water grade line, with such expedition that a single engine and crew can move such enormous trains loaded to destina-

tion and return to the river point with a train load, consisting in part of empties and in part of traffic loaded in the reverse direction, all within eight hours. This transportation performance is so remarkable as to exclude any suggestion that the compared local rates covered traffic moved under similar circumstances and conditions.

Moreover, as we have pointed out (pp. 86-92, *ante*) the Commission has subsequently held that, under the standards of the Act, lake-cargo rates being in the nature of proportional rates, may not be measured by the local rates either to the same destination or between other points. The ex-river rates are of similar character. Unless the Commission may arbitrarily adopt one standard in one case and another in another, it is obvious that, particularly in the absence of any contrary conclusion plainly expressed in the report, the compared rates were considered by the Commission in their relation to the issue of alleged disruption. Indeed, as appears from the record, they were offered for this purpose and this purpose alone and not for the purpose of showing that the existing rate was unreasonably low, measured by the service covered thereby and judged by the conditions under which performed. This is so since, as already appears, the sole basis of the carriers petition for rehearing, the evidence offered, and the interpretation placed thereon by counsel at the conclusion of the hearing were that these rates should be advanced because they were so low as to menace the all-rail rate structure.

The most that can be said for these comparisons and the manner of their treatment in the report is, as said in the *Milwaukee* case, that while there may be parts of the report, suggestive of a different meaning from that attached to the report as a whole by the Court, no basis of the Commis-

sion's action, other than that described in the summary, is stated with sufficient clearness to support the order.

If, however, the rate comparisons referred to in the report were intended by the Commission to afford a basis for the order, they are wholly insufficient for the reasons now to be given.

1. The general statements in the report in the *Third Ex-River Case* respecting rate comparisons and similarity of railroad services on the compared rates.

The report of the Commission in support of the order now under review refers to a number of rail rates on coal and on other commodities, both within and without central territory, some of which are rates on coal from inland mines to rail destinations (R. 29-36). The only definite conclusion which the report states in respect of these compared rail rates is that "All of these rates are as high as or higher, *distance considered*, than the suggested rate of $1.01[1] from Colona and Conway to Youngstown" (R. 32) [emphasis added].

Speaking of the service rendered by the railroad in connection with ex-river coal "at and from the river transfer points" (R. 43), the report states:

> "The service of switching, furnishing empty cars, and classifying the shipments at these transfer points are not materially different from those performed at the mines" (R. 39).

And again:

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[1]As previously noted, the trunk lines in the *Third Ex-River Case* had suggested a rate of $1.01 in order to "protect the all-rail rate structure" (R. 958, see p. 29 *ante*).

> "From an operating standpoint these cars of ex-river coal are handled in substantially the same manner as the coal from mines in Ohio No. 8 district in the same general territory"[18] (R. 39).

And, under the heading "Summary", the report states:

> "These cases were first decided at a time when ex-river coal was not being transported, and the character of the service that was to be rendered thereon could not be ascertained. The present record shows clearly that the service rendered on ex-river coal at and from the river transfer points is identical with that on coal from local mines served by tracks similar to those at the river transfer points" (R. 43).

The report does not make it entirely clear what the purpose of the Commission was in referring to these rate comparisons and in making these statements respecting similarity of the service rendered by the railroad companies in respect of coal loaded by them at mines and in respect of coal tendered them from barges at river transfer points. The aim of the carriers in introducing evidence on these points was stated by them to be to show that the rate of $1.01 which they proposed for the ex-river haul to Youngstown was "equal to all-rail rates for corresponding distances or transportation services" (R. 959-960). Obviously, rate comparisons are of no value in this case unless they establish, at the very least, that a rate of 90c for the 40 mile ex-river haul to Youngstown is consistent with like rates within central territory for hauls under similar conditions in connection with which the railroad performs no more costly service. If that were established, it may be assumed that the Commission would have a basis for the conclusion

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[18] This does not refer to services performed on ex-river coal to Youngstown.

that a lower rate than 90c either operates to disrupt the all-rail rate structure in central territory or is unreasonable, —provided it also appeared that the compared rates were reasonable for the services rendered thereon. Passing altogether the question of the reasonableness of the compared rates, and assuming *arguendo* that they are reasonable for the services rendered thereon, it is our position that neither the report in this *Third Ex-River Case,* nor the whole record, affords any support for the conclusion that the 77c rate is lower than other rail rates on coal, or on any other commodity, for a similar distance, within central territory or without it, upon which the railroad performs similar services at similar cost to it. If we are correct in this position, then neither the evidence as to the rate comparisons, nor the loose discussion thereof in the report of the Commission, affords any basis for a finding that the 77c ex-river rate to Youngstown will disrupt the rate structure in central territory, or that such rate is unreasonably low.

2. In both the *Third Ex-River Case* and the *First Ex-River Case* the reports disclose, and the uncontradicted evidence establishes, that road-haul conditions, maximum loadings, and terminal delivery services and expenses are extremely favorable to the railroads and permit of ex-river hauls to Youngstown at a minimum cost.

The report in the *First Ex-River Case* points out that the lines of the Pennsylvania and P. & L. E. from Conway and Colona to Youngstown are multiple track lines having a ruling grade of 0.3 of 1%, making it possible to move trains of 90 to 100 carloads in the winter and 100 to 115 carloads in the summer with a single train crew; that the

loading of coking coal will average 70 tons or more per car and of domestic coal 56 tons or more (R. 76-77); and that there will be a substantial return tonnage (R. 80-81). The report in the *Third Ex-River Case* repeats these same facts as to operating conditions and states that the P. & L. E. "regularly hauls these heavy trains from Colona to Youngstown, delivers them, picks up trains of empties as well as loads, with the same train crews, and returns to Colona in eight hours" (R. 33); and that "The service over the Pennsylvania from Conway to Youngstown and return is as favorable as that of the Pittsburgh & Lake Erie from Colona" (R. 33). With respect to delivery charges, the Report in the *First Ex-River Case* points out that the ex-river rate contemplates the absorption of switching charges at Youngstown, which range from $2.70 per car [or an average of about 5c per ton], to 19c per ton, but that there will be no switching charges at destination on about 75% of the coal (R. 75, 80). The report in the *Third Ex-River Case* repeats these same figures with respect to the absorption of switching charges (R. 41). With respect to maximum loadings, the predictions of the report in the *First Ex-River Case* are stated as demonstrated facts in the report in the *Third Ex-River Case* (R. 33),—indeed, the report in the *Third Ex-River Case* is predicated upon the view that there is a large movement of coal through Conway and Colona (R. 41-42, 33).

There are no findings or statements in any of the reports, and there are no facts of record, to contradict these established facts showing the exceptionally favorable operating conditions, and low costs, of the ex-river hauls to Youngstown in these particulars.

3. There is no statement in the report in the *Third Ex-River Case*, and no evidence whatever in the record, as to the conditions of the road haul, as to the volume of traffic, or as to the switching charges absorbed or the cost of terminal delivery service, in respect of any of the compared rates relied on by the Commission in the report in the *Third Ex-River Case*.

There is no statement in the report in the *Third Ex-River Case* with respect to the road haul conditions, the tonnages, the cost of terminal delivery services, or the amount of absorption of switching charges at destination, on any single one of the compared rates to which the report refers. The statements in the report in the *Third Ex-River Case* (quoted just above, p. 96, *ante*), as to the similarity of operating conditions on hauls from the mines and on hauls from the river transfer points, do not relate to these matters. If such statements can be construed as relating to these particular operating conditions on the hauls on the compared rates, and if they were intended as referring thereto, then they are not supported by one iota of evidence.

4. If the statements in the report concerning the similarity of railroad services rendered on the ex-river rate to Youngstown and on the compared rates are intended to mean anything more than that the assembly service at Conway and Colona is identical with that at any mine where the track facilities and tonnages are similar, then they are not supported by any evidence.

The only statements contained in the report respecting the similarity of operating conditions on the ex-river rates and on the compared rates appear at R. 39 and R. 43 and have been set out in full on page 96 of this brief, *ante*. The statements refer only to similarity in respect of move-

ments from mines. None of the compared rates from mines relied on in the Commission's report relates to movements to Youngstown over the tracks of the Pennsylvania and P. & L. E. Thus, even though those statements be considered as a finding that railway "pick-up" or assembly service at mines is identical with that at river transfer points, the fact would still remain that there is no evidence and no finding as to the conditions of the road-haul or the terminal delivery costs upon any of these compared rates from mines. The statements as to similarity relate, therefore, only to one phase of the service performed on the rate, and afford no basis for a conclusion of similarity of railroad services and costs under the compared rates and under the ex-river rate.

Moreover, the statements referred to do not mean that the services rendered by the railroads in loading coal at mines generally in central territory, and in loading coal tendered them from barges at Conway and Colona, are identical in respect of costs to the railroad or length of time consumed. If they do mean that, they are without any evidence to support them. The only evidence in the record upon which these statements may be deemed to be based establishes no more, when read as a whole, than the obvious fact that if at any particular mine there are facilities and tonnages identical to those at Conway and Colona, the service rendered by the railroad would be the same (R. 1012-1027, 301-320).[2] It may be perfectly true that in loading

[2]The only carrier witness on the point in the reopened hearing aptly summed up his own evidence:

> "There is no difference so far as I can see in the transportation operations involved in placing empties and handling coal from the Conway transfer facilities as compared to coal originating *at a mine in the same location with the same general track capacity and operating conditions*" (R. 1014). [Emphasis Added]

coal from a mine having such facilities, and which is prepared to offer its coal in trainload lots, the assembly services would be no more costly to the railroads than at Conway and Colona. But the evidence is that at Conway and Colona there are such facilities, coupled with nearby main yards, as to permit of the most expeditious and least costly of assembly services (R. 289-294, 301-302, 311-320). Moreover, there is a heavy and continuous volume of coal for shipment at Conway and Colona, so much so that, according to their own witnesses, the carriers are moving maximum trainloads from these points "day in and day out" within the limits of their facilities (R. 312, 33, 42, 1026). It further appears by this record that there are as many as 151 active mines in the Pittsburgh District, 78 active mines in the Connellsville District and 117 active mines in the Fairmont District, a total of 346 active mines in these three districts, all of which are served by the rail carriers (R. 1599-1601). The extensive system of branch lines necessary to serve these mines is shown by a map of record (R. 1408A). There is nothing in the record to show that all, or indeed, any of these mines are prepared to offer to the railroads the continuous large volume of coal offered them at Conway and Colona or to offer it under such favorable conditions as at Conway and Colona. The record affords support for the conclusion that thirty cars of coal may be assembled per engine hour at river transfer plants (R. 385-387). The carriers' witness ventured the opinion, with no supporting details, that "ordinarily, I would say that a mine run will handle from 10 to 25 loaded cars an hour" (R. 1019), but this opinion evidence is utterly worthless in view of the Commission's own findings in *Lake Cargo Coal Rates,* 181 I. C. C. 37, 45, where it appeared from operations studies that in mine run serv-

ice the cars assembled per mine run hour varied from 2.50 by the B. & O. in the Pittsburgh District to 7.52 by the L. & N. in the Harlan, Kentucky, District, and the C. & O. in the Kentucky and Big Sandy Districts. In that report it appeared that the average performance of the Pennsylvania in mine run service in the Pittsburgh District—the very service as to which the carriers' witness in this case ventured the opinion respecting the 10 to 25 loaded cars an hour—was but 4.83 loaded cars per hour. As the Commission remarked in an earlier case (*Lake Cargo Coal Rates* (1925), 126 I. C. C. 309, 324), "Mine run service is said to be the slowest service measured by speed per hour of any freight service with the possible exception of certain way freight train service." In this case the carriers introduced no evidence as to actual assemblies per hour in mine run service, but relied upon the opinion evidence above mentioned.

It is thus clear that the statements of the Commission in its report in the *Third Ex-River Case*, now under discussion, cannot be accepted as impairing the force of the Commission's statements in its report on the *First Ex-River Case* to the effect that the character of the Conway-Colona facilities are such as to provide for "an expeditious rail movement of ex-river coal at the lowest possible cost of operation" (R. 76), and that the carriers could perform the switching services thereat "more efficiently and at substantially less cost than is now generally performed by them at the mines for all-rail movements" (R. 80).

We submit:

(a) If construed in the light of the testimony upon which alone they can be based, these statements in the report in the *Third Ex-River Case* mean no more than that if any particular mine has

the same facilities as exist at Conway and Colona, the service there performed by the railroad in assembling a trainload of coal (assuming that mine offers that much) will be the same as that performed by it at Conway and Colona. So construed, the statements are obviously of no help to a decision of this case.

(b) If construed to mean, broadly and generally, that the railroad services performed in assembling a trainload of coal at Conway and Colona and at the mines generally are similar as respects cost and time, then the statements are not supported by evidence.

(c) Even if so construed, and if supported by evidence, the statements do not go to show a similarity of operating conditions as a whole on the ex-river movements to Youngstown and on the compared movements from inland mines to rail destinations.

5. Rate comparisons based upon distance alone, as are those relied on by the Commission in its Report in this case, are utterly worthless. As shown by this record, any desired rate can be supported by such comparisons.

All rate comparisons relied on in the Commission's Report are set out below, together with our comment thereon:

(1) "The suggested rate to Canton and Massillon is the same as prescribed in the Ohio Case from the Middle district of Ohio for distances of about 42 miles over all routes, the short route distances being 36.6 and 38.3 miles, respectively. Much of the coal tonnage from Conway and Colona to Youngstown

proper moves a short-line distance of slightly under 40 miles" (R. 30):

> It is assumed that "the suggested rate" referred to is the rate of $1.01 proposed by the carriers for the ex-river haul to Youngstown and that the compared rates referred to are the rates approved by the Commission in the *Ohio Case* for all-rail hauls of coal from Ohio coal districts to Canton and Massillon. Otherwise the whole statement is incomprehensible, and even on that assumption it is erroneous.[3] The rate approved in the *Ohio Case* from Ohio Middle District to Canton is 76c for a haul of 33.9 miles, not $1.01. This is shown by the table of the Ohio rates on page 1597 of the Record (see also R. 1604), and by the table in the Commission's Report at R. 31, which has been corrected by a footnote to show the Commission's error. A further examination of the table of Ohio rates (R. 1597) shows a rate of 76 cents from the Middle-Coshocton Dis-

[3]The suggested rate to Canton and to Massillon was $1.26. The rate prescribed in the Ohio case from the Middle District and the Middle-Coshocton District to Canton, as stated in the text, a distance of 33.9 miles from the Middle District and 36.6 miles from the Middle-Coshocton District, was 76 cents, and the rate to Massillon, a distance of 40.6 miles from the Middle District and 38.3 miles from Middle-Coshocton District, was $1.01. Neither of these rates approaches the suggested rate of $1.26.

If the Commission was attempting to show that the suggested rate of $1.01 from Conway and Colona to Youngstown is the same as prescribed in the Ohio case from the Middle District of Ohio to Canton and to Massillon, it commits a grievous error in respect of the rate to Canton which, as shown in the text, was fixed at 76 cents for distances of 33.9 and 36.6 miles from the Middle District and the Middle-Coshocton District, respectively. It is believed that this error of the Commission is traceable to carriers' Exhibit F-7 and to the testimony of carriers' witness Kern set forth in the last paragraph of page 980 of the Record. The language of the report is but a paraphrase of Mr. Kern's testimony.

trict to Canton for 36.6 miles and a rate from the same district to Massillon of $1.01 for 38.3 miles, as well as the rate of 76 cents from the Middle District to Canton for 33.9 miles and a rate of $1.01 from the Middle District to Massillon for 40.6 miles. It also appears that the Ohio rates are blanket rates each covering a number of mines variously located. The distances are thus average distances, which is not true in respect of the ex-river hauls to Youngstown. There is no finding as to the transportation conditions on these Ohio hauls.

(2) "In justification of the rates suggested by petitioners, rates ranging from $1.01 to $1.26 for distances of 40 to 55 miles within or near the Pittsburgh district are instanced.[4] Rates ranging from 94 cents to $1.35 between points on the line of the Pennsylvania Railroad Company for distances of 20 to 50 miles are also shown.[5] Actual movements under these rates have taken place. Rates for $1.01 and $1.13 for distances from 23.8 to 42.8 miles applying between points on the Pennsylvania, Panhandle division, and the line of the Pittsburgh, Chartiers & Youghiogheny Railway Company are also exhibited.[6] A rate of 88 cents is shown for average distances of 27.7 miles over the line of the Pittsburgh and Lake Erie Railroad Company in the same general territory as the movement from

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[4]This statement is taken from Exhibit F-19 (R. 1414). Except for immaterial alterations, Exhibit F-19 is identical with Exhibit 20 in the *First Ex-River Case* (R. 1148).

[5]This is taken from Exhibit F-20 (R. 1415) which, except for immaterial alterations, is the same as Exhibit 21 in the *First Ex-River Case* (R. 1150).

[6]Taken from Exhibit F-21 (R. 1415) which, except for immaterial alterations, is identical with Exhibit 22 in the *First Ex-River Case* (R. 1152).

Colona to Youngstown.[7] All of these rates are as high or higher, *distance considered,* than the suggested rate of $1.01 from Colona and Conway to Youngstown. Other all-rail rate comparisons of a similar nature were introduced"[8] (R. 32). [Emphasis added.]

There is no evidence whatever to show the transportation conditions involved in any of the hauls on any of these compared rates. The report does not pretend that there is and merely states "All these rates are as high or higher, *distance considered,* than the suggested rate of $1.01 from Colona and Conway to Youngstown." As shown by the notes we have appended to the above passage, all of these rate comparisons were before the Commission in the *First Ex-River Case.* There was no showing that coal was actually moving on these rates or how substantial the tonnages were. In fact, the carriers' own witness admitted at the hearing of the *Third Ex-River Case* that the carriers were unable to say whether any movements at all had taken place on these rates within the last four years and that the carriers' tabular exhibits from which the rates referred to by the Commission are taken "really speak as of four years ago" (R. 1005). These criticisms apply equally to the "other all-

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[7]Taken from Exhibit F-22 (R. 1417) and, except for immaterial alterations, is identical with Exhibit 29 in the *First Ex-River Case* (R. 1154).

[8]The "other all-rail rate comparisons of a similar nature" which the Commission states were introduced are the rate comparisons set forth in Exhibits F-23 (R. 1420), F-24 (R. 1421), and F-25 (R. 1422). Except for immaterial alterations, Exhibit F-23 is identical with Exhibit 18 (R. 1146); Exhibit F-24 with Exhibit 19 (R. 1147) in the *First Ex-River Case;* and Exhibit F-25 with Exhibit 128 in the *Second Ex-River Case* (R. 1337).

rail rate comparisons of a similar nature" which the Commission says "were introduced". Moreover, the tables which appear in the record and from which the Commission has selected the rates referred to by it in the passage quoted above show origin and destination points, and a glance at any map will show that much of the movement is through mountainous territory, since these rates relate mainly to movements in western Pennsylvania, northern West Virginia, and in the "hog-back" around which the Ohio River flows in a "horseshoe" movement from Pittsburgh to Steubenville. Those tables also show on their face that distance alone is not a safe guide for rate comparisons. For example, Exhibit F-19 (R. 1414), which is the basis of the first sentence in the above-quoted passage of the report, shows rates of $1.00 and $1.01 for a number of 50-mile hauls, but rates of $1.24 for a 44-mile haul and $1.26 for a 42-mile haul; and the record does not offer any explanation for the disproportion. Exhibit F-20 (R. 1415), which is the basis for the second sentence in the above-quoted statement shows a rate of $1.35 for a 35-mile haul but a number of rates of $1.01 for hauls more than 40 miles, including two that are 49 miles long. There is also a 39-mile haul at 94 cents. The record does not explain. Exhibit F-22 (R. 1417-1419), which is the basis for the statement quoted above with respect to the 88 cent rate on the P. & L. E., shows a rate of $1.01 for a haul of 51.1 miles, but a rate of $1.26 for 21.1 miles. Again the record does not show why. The tables which formed the basis for the Commission's statement as to "other all-rail rate comparisons" show similar discrepancies.

We submit that the briefest examination of the Commission's general discussion of rate comparisons, and of the evidence upon which it is based, establishes beyond dispute that the reasonableness of rates cannot be judged by distance alone, and that there is no homogenous rate structure in Central Territory, built upon distance. It is impossible to conclude, therefore, upon the basis of the rate comparisons in this record, that the 77c ex-river rate to Youngstown is unreasonable either in respect of the cost or value of the service performed or in its relation to other rates in Central Territory. It also clearly appears that there simply is no rate structure in Central Territory to be disrupted, if by disruption of rate structure is meant an establishment of a rate for a particular service which is out of relation to other rates for similar service.

(3) "The all-rail rate from the Pittsburgh district, the base group, to Cleveland, 162 miles, is $1.84, and to Youngstown, 96.5 miles, $1.34, and these rates were approved in the *Ohio* case. Comparisons were made in the former reports herein with the scale prescribed in *Holmes & Hallowell Co.* v. *G. N. Ry. Co.*, 69 I. C. C. 11, hereinafter termed the H. & H. scale. The $1.84 rate from the Pittsburgh district to Cleveland is about 93.5 per cent of the H. & H. scale; the rate to Youngstown 92.5 per cent.

"The ex-river rate of $1.01 proposed from Conway and Colona to Youngstown is substantially 100 per cent of the H. & H. scale. The rate of 77 cents previously approved from and to these points is about 82 per cent of the H. & H. scale for distances of 30 to 40 miles, and 75 per cent of that scale for distances of 40 to 50 miles. As previously stated, the weighted-average haul is 42 miles." (R. 32)

The purpose of all this appears to be to supply a base for the subsequent statement of the Commission that "The ex-river rates suggested by petitioners [*i.e.*, $1.01 to Youngstown and $1.26 and $1.74 to other northeastern Ohio points] are consistent with the all-rail rates prescribed or approved by us for application in this same general territory both in the *Ohio* case and in other cases" (R. 32). As to this:

It could not, of course, be said that the suggested $1.01 rate to Youngstown is consistent with the all-rail rates from the mining districts to Youngstown, for even the 90c rate is not consistent with them. The record shows that the 42 miles from Conway and Colona to Youngstown are the most favorable portions of the all-rail haul to Youngstown, and the terminal and delivery service and cost are just the same on the ex-river haul as on the all-rail haul, while the pick-up or assembly service at the mines is more costly to the railroads than is the assembly service at the river transfer points, as previously demonstrated herein. Yet, while the 42-mile ex-river haul is but 43% of the 96.5-mile haul from the Pittsburgh District to Youngstown, the 90c rate is 67% of the all-rail rate of $1.34 found to be reasonable in the *Ohio* case; and while the ex-river haul is but 29% of the all-rail haul from the Connellsville District to Youngstown, yet the 90c rate therefor is 63% of the all-rail rate of $1.42 found to be reasonable for the 142-mile all-rail haul from that district.

The purpose may have been to afford a basis for the view that the 90c ex-river rate to Youngstown bears the same relations to the Holmes & Hallowell scale rate as does the all-rail rate to Youngstown and beyond. If that was the pur-

pose, then the Commission has accomplished it only by the device of telling half the story. It states that the all-rail rate of $1.34 from the Pittsburgh District to Youngstown is 92.5% of the Holmes & Hallowell scale for that distance; that the ex-river rate of $1.01 to Youngstown proposed by the carriers is substantially 100% of that scale, but that the ex-river rate of 77 cents is 75% of that scale for a weighted average haul of 42 miles. The report significantly fails to mention, however, that the all-rail rate of $1.42 for the 142-mile haul from the *Connellsville* District to Youngstown is but 78% of the H. & H. scale (that scale prescribing $1.82 for distances between 140 and 150 miles), although the Connellsville District is the origin district for the greater portion of the ex-river coal moving to Youngstown (R. 29, 462, 1292A, 1292B). The evidence of record shows, and this was adverted to by the Commission in its report in the *First Ex-River Case*, that rates generally in Central Territory are at 83.7% of the H. & H. scale (R. 81-82). It thus appears that it is the 77c ex-river rate, not the 90c ex-river rate, which bears the same relation to the H. & H. scale as do the all-rail rates in Central Territory.[9]

(4) "The suggested rate of $1.01 from Conway and Colona to Youngstown is also compared with the

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[9]The Commission, of course, did not and could not question the ruling it had made in the *First Ex-River Case* to the effect that the Holmes & Hallowell scale rates cannot be applied 100% in Central Territory, since that scale was prescribed for territory in which the level of rates "is substantially higher and the traffic far less dense than in Central Territory" (R. 84, 74). As previously pointed out herein, the H. & H. scale was prescribed for ex-lake bituminous coal moving from the head of the Lakes in the Northwest under operating conditions much more severe than those involved in Central Territory (see p. 18 *ante*, note 24).

all-rail rate of $1.04 from the Leetonia group to Youngstown, for about the same distance, a portion of this origin group lying geographically between Conway and Colona, on the one hand, and Youngstown on the other." (R. 32)

> This refers to the only rate comparison which was before the Commission in the *Third Ex-River Case* that was not before it in the *First Ex-River Case*. As previously pointed out herein, this was a local rate under which only 8,779 tons of coal had moved in the years 1920-1932 to northeastern Ohio destinations whose total receipts from all sources in the same years were 225,000,000 tons (R. 1437-1442). In its brief in the court below, the Commission stated that this Leetonia rate was mentioned by it "merely in the recital of the contentions of certain parties to the proceeding" and that it attributed no special effect to that comparison.

The above are *all* of the compared rates referred to in the Commission's report which are higher or relatively higher than the 77c ex-river rate to Youngstown. There were other rate comparisons in evidence both on coal movements and on movements of other commodities, within Central Territory and without, which are substantially lower than this 77c rate. Some of these are mentioned in the Commission's report (R. 34-36), but many of the most significant of them are not. These will be discussed below. The immediate purpose here has been served by establishing above that the compared rates upon which the Commission appears to have placed reliance in reaching its 90c order do not afford any support whatever for that order.

6. The rates referred to and relied upon as comparisons by the Commission in its Report are all local rates, although ex-river rates are in the nature of proportional rates and the Commission, in this Report and elsewhere, recognizes it as a principle of rate-making that proportional rates are made lower than local rates.

The rates referred to and relied upon as comparisons in the Report of the Commission, as above noted, are all rates which are applicable on all-rail traffic from the mines to destination, that is, local rates. But ex-river rates, like lake-cargo rates, are rates in the nature of proportional rates since they apply to portions of much longer total hauls (A. 1102, 959-960, 35, 80). In its Report in the *Third Ex-River Case,* the Commission, citing and quoting its own prior decisions and referring to the ex-lake and lake cargo rates, twice points out that proportional rates and rates in the nature of proportional rates:

> "are made lower than the local rates because they apply to portions of much longer total hauls. That principle has long been recognized in rate making";

and again,

> "We have frequently prescribed such rates on a lower basis than corresponding local rates" (R. 35).

Yet the Commission relied only upon local rates in its discussion of comparisons. It referred to two proportional rates only, and these it rejected (R. 34-36). It failed to refer to the most apposite and convincing proportional rates in support of the 77c ex-river rate, as will be shown in the next subdivision below.

These considerations speak for themselves.

7. The Commission ignored the most apposite rate comparisons appearing in this record, *i.e.*, the proportional rates offered by these appellants, which clearly establish that the 77c ex-river rate is not unreasonably low and will not disrupt the rate structure.

If the Commission was justified in drawing any conclusions from rate comparisons unaccompanied by showings of similarity of transportation conditions, it ignored the most apposite comparisons of record. The report fails to mention proportional rates offered by the appellants for comparative purposes. The Commission's order establishes that the Commission also failed to give these any consideration, for they are the most apposite comparisons of record and they support an ex-river rate to Youngstown of 77c or even lower. Some of these comparisons are carrier-made rates and some are Commission-made. They are proportional rates and some of them apply in Central Territory and others outside of that territory. The evidence thus ignored by the Commission shows:

> (1) A rate established and maintained by the C. & O. for coal from inland mines in the Logan District to Huntington, West Virginia, for further shipment by river. This rate is 50c per ton for an average haul of 81 miles. It has been in effect for at least 20 years and approximately two million tons of coal move on it annually. The local rate for the same haul is $1.08 (R. 82, 1090, 1170). The Logan District is a Crescent District, and the rates therefrom are a part of the rate adjustment to Central Freight Association Territory.
>
> As long as this rate is in force within Central Territory, how is it possible to say that the higher 77c ex-river rate for a shorter haul to Youngstown

is unreasonably low or disrupts the rate structure in Central Territory? Yet, the C. & O., joined by the present carriers appellee, has recently actively defended this 50c rate from the Logan District to Huntington and, according to the Commissions' report in that proceeding, made no contention that such rate tended to disrupt the rate structure.[10] And the present appellees, joined by the C. & O., petitioned the Commission for a reopening and rehearing of the *Ex-River Cases* on the ground that the 77c ex-river rate tended to disrupt the rate structure because it was too low!

(2) A rate of $1.15 per ton (inclusive of transfer charges to barges) recently established and presently maintained by the B. & O. for coal moving 110 miles and more from the Myersdale, Pennsylvania, mining district to Glenwood, Pennsylvania, on the Monongahela river; the local rate from the same mines for delivery to consumers at Glenwood being $1.39 per ton (R. 1090). The Myersdale district is one of the Crescent districts and the rates therefrom are a part of the rate adjustments to Central Freight Association territory. Yet the B. & O., although establishing and maintaining this relatively lower rate from inland mines to the river, complains before the Commission and this Court that the higher 77c ex-river rate to Youngstown tends to disrupt the rate structure in central territory.

(3) In respect of rates prescribed by the Commission on ex-river coal, the record shows that for a distance in excess of 80 miles from Cincinnati, Ohio, to Fleming, Indiana, and to Seymour, Indiana, the rate is 91 cents (R. 1296-E). A rate of $1.04 is also in effect on ex-river coal from Cincinnati for dis-

[10]See *Northeast Kentucky Coal Bureau* v. *Chesapeake & Ohio Ry.*, 201 I. C. C. 165; same case on rehearing, 206 I. C. C. 445, decided February 7, 1935.

tances ranging from 80 miles to 160 miles—Indianapolis being typical, its distance from Cincinnati being 109.6 miles—the average distance being 88.4 miles (R. 1296-E.). These rates were prescribed by the Commission a number of years ago. The record also shows (R. 861) that the Commission in 1931 prescribed a rate of 80 cents on ex-river coal from Cincinnati to Hamilton, Ohio, and to Middletown, Ohio, average distances of 32.9 and 44.4 miles, respectively, from Cincinnati. *American Rolling Mill Co.* v. *B. & O. R. R. Co.*, 173 I. C. C. 357. So far as is known, there has been no claim made by the carriers that those rates are unreasonably low or that they threaten the disruption of the all-rail rate structure.

(4) The appellants also introduced for comparative purposes rates lower than the 77c ex-river rate which are applicable in central territory upon iron ore, furnace fluxing stone, crushed stone, sand and gravel, and other commodities. Some of these rates are ex-lake rates and some are local rates. With respect to these comparisons the Commission in its Report in the *First Ex-River Case* said:

> "They also instance many rates for comparable distances on low-grade commodities such as bituminous coal, mine props, stone, sand and gravel, iron ore, and pig iron, usually moving in open top cars, that are materially lower than the proposed rate for 41.7 and 43 miles. Within a range of 50 to 56 cents, the hauls on these compared commodities range from 40 to 81 miles. Other rate and mileage ranges in connection with the movement of the low-grade commodities are 60 to 69 cents for 26 to 208 miles, 70 to 79 cents for 35 to 208 miles, and 80 to 88 cents for 34 to 255 miles" (R. 82).

In the Report in the *Third Ex-River Case* the Commission, while admitting that the earnings on the 77c ex-river rate are greater than the earning on those rates, brushed these comparisons aside with the mere statement that "apparently the rates on coal have never been made with reference to the rates on these compared commodities" (R. 34), adding, with respect to the "relatively low rates on fluxing stone", that "apparently these rates are depressed to meet water competition and are not significant comparisons" (R. 34). The "apparently" is used advisedly, for the carriers introduced no evidence to show that the fluxing stone rates are water-compelled, and the only "evidence" to that effect is a statement on cross-examination of a shipper's witness to the effect that he had *heard* that there was some movement of fluxing stone on the river and that that may have had something to do with the rates (R. 1053). But even if the fluxing stone rates are water-compelled, they are very significant as showing the cost to the railroads of moving coal from Conway and Colona to Youngstown. The fluxing stone rates apply from the Hillsville-Walford district, adjacent to Youngstown, to such destinations as Aliquippa, which is adjacent to Colona and Midland, only a few miles from Conway. The hauls are on the same rails but in the reverse direction as are the hauls on ex-river coal from Conway and Colona. At the time of the hearing on the *Third Ex-River Case*, the rail carriers were proposing to reduce the 55c per gross ton rate on such fluxing stone to 42c per gross ton (the equivalents, respectively, of 49.1c and 37.5c per net ton) (R. 1037), and such reduced rates went into effect on October 1, 1933. It appears of record that, assuming the same volume of fluxing stone and the same volume of ex-river coal, the cost of transporting ex-river

coal from Colona to Youngstown over the same rails is relatively the same as the cost of transporting the fluxing stone from the Hillsville-Walford district to Aliquippa (R. 315). These fluxing stone rates were therefore important evidence as to the cost of the ex-river coal hauls to the rail carriers, yet the Commission dismissed them in a word.

(5) The appellants also relied upon lake cargo coal rates, which are relatively lower than the 77c ex-river rate, and upon similarly low ex-lake bituminous coal rates from Chicago to Rockford, Illinois. The Commission brushed the lake cargo coal rates aside upon the ground that they were made under stress of competitive conditions and cover coal upon which there are two separate railroad services in addition to the lake haul (R. 35). It admitted, however, that the railroad earnings on the ex-river rates are higher than on the lake cargo rates, measured by car earnings or car miles (R. 34); and its failure to give consideration to these rates as comparatives overlooks the fact that they, like the ex-river rates, are in the nature of proportional rates, and that the Commission prescribed the lake cargo coal rates as reasonable maximum rates just as it did in respect of the 77c ex-river rate to Youngstown.

The relatively low ex-lake bituminous coal rate from Chicago to Rockford was brushed aside by the Commission with the statement that "The rates on bituminous coal in the Illinois territory are relatively lower than in the Ohio territory as explained in the *Ohio* case" (R. 35-36). The correctness of this statement was challenged by Commissioner Eastman in his dissent in the *Ohio* case (see R. 1593-1595). This ex-lake rate is in the nature of a proportional, just as is the ex-river rate.

We submit that it is clear from all of the above not only that the rate comparisons relied upon in the Commission's report in the *Third Ex- River Case* do not support a finding either that the 77c ex-river rate would cause a disruption of the rate structure in Central Territory or that it is unreasonably low, but that the only apposite evidence as to rate comparisons establishes that the 77c ex-river rate is not unreasonably low and is properly related to, or is higher than, comparable rates within that territory.

POINT III

THE COMMISSION EXCEEDED ITS POWERS AND DUTIES UNDER THE INTERSTATE COMMERCE ACT, AS AMENDED, IN THAT IT PRESCRIBED A MINIMUM RATE OF 90 CENTS FOR THE TRANSPORTATION OF EX-RIVER COAL FROM CONWAY AND COLONA TO YOUNGSTOWN FOR THE ALLEGED PURPOSE, AMONG OTHERS, OF ELIMINATING UNDUE PREJUDICE AND UNDUE PREFERENCE WHICH DID NOT EXIST.

The Commission, probably recognizing the weakness of the record, as the basis for its finding that the 77c rate, or any rate less than 90c, was unreasonably low, sought to bolster its order and further the purposes it had in mind in connection with the entry of such order by its finding in respect of undue preference of river mines and undue prejudice against inland mines. In light of the history of the proceedings before the Commission and of the circumstances under which the 77c rate had been prescribed by it as a reasonable maximum rate, its finding and order in respect of undue prejudice and undue preference may not be supported. The Commission, under the circumstances before it, exceeded its powers and duties under the Act in making such findings and entering such order.

The order of the Commission provides in part, as follows (R. 1541):

> "It is ordered that respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 15, 1934, and thereafter to abstain from publishing, demanding or collecting their present ex-river rates for the transportation

of bituminous coal, in carloads, from Colona and Conway, Pa., to Youngstown, Ohio, * * * which are found in said report to be unreasonably low, unduly prejudicial and unduly preferential.

It is further ordered that respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 15, 1934, * * * and thereafter to maintain and apply to the transportation of ex-river coal originating at mines on the Monongahela, Allegheny and Ohio rivers, transferred from river barges or boats to railroad cars, when for track delivery at destination, minimum 50,000 pounds per car, rates which shall not be less than the following: from Colona and Conway, Pa., to Youngstown, Ohio, 90 cents per net ton; * * *."

It is not clear from the order or from the report the source of the power sought to be exercised by the Commission in respect of the elimination of the alleged undue prejudice and undue preference. At first blush, it appears that the Commission was purporting to act under Section 3(1). A more careful reading of the report and order, particularly the order, seems to indicate that the Commission, contrary to the teaching of *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 633, was attempting to effect the elimination of the alleged undue prejudice and undue preference by the exercise of its minimum rate-making power although there was no showing and no finding that the rate complained of was non-compensatory or so low as to cast a burden on other traffic. Still further consideration of the report and order leads to the belief that the removal of the alleged undue prejudice and undue preference was merely incidental to the exercise by the Commission of its power under Section 15 (1) to establish a reasonable rate.

1. In form, the order is not a Section 3 order.

If, as stated in the Commission's brief below, the Commission was purporting to eliminate the alleged undue prejudice and undue preference pursuant to the authority of Section 3(1) of the Interstate Commerce Act, the foregoing order, in so far as it is based on such alleged undue prejudice and undue preference, is void for the reason that it does not afford an alternative method of removing such alleged undue prejudice and undue preference by raising the lower rate, lowering the higher rate, or altering both, as required by Section 3(1). "Where an order is made under Section 3 an alternative must be afforded." *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 650.[1]

The reason why the Commission, if acting under Section 3(1), did not frame the order in the alternative is obvious. Under Section 3(1), the situation must be such that the carrier or carriers, if given an option, have an actual alternative. *Texas & Pacific Ry. Co.* v. *United States, supra.* An actual alternative could not be given here. The Colona-Conway to Youngstown rate of 77c was prescribed by the Commission as a reasonable *maximum* rate. It was lower than the respective rates from the Pittsburgh, Connellsville and Fairmont districts to Youngstown. Being a reasonable maximum rate the carriers could not raise it. They could only remove the alleged undue preference and undue prejudice by lowering the higher rate which, of course, presented no alternative and gave them no option.

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[1]Compare *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *St. Louis South Western Ry. Co.* v. *United States*, 245 U. S. 136, 145; *Central R. R. of N. J.* v. *United States*, 257 U. S. 247, 248.

2. In form, the order is a Section 15 order.

Support for the Commission's order, if any there be, in respect of the alleged undue preference and undue prejudice must be found elsewhere in the Act. Such support must be found, if at all, in Section 15(1). The form of the order and the similarity of the language thereof to the language of Section 15(1) indicate it must have been that section on which the Commission based its order.

Section 15 is one of the so-called jurisdictional sections of the Act. Paragraph 1 thereof which confers upon the Commission power to fix rates was originally enacted and added to Section 15 of the original Act by Section 4 of the Hepburn Act (June 29, 1906, 34 Stat. L. 589). Section 12 of the Mann-Elkins Act (June 18, 1910, 36 Stat. L. 551) further amended the Section by authorizing the Commission to initiate investigations of rates and practices. Section 418 of Transportation Act, 1920 (February 28, 1920, 41 Stat. L. 484) added the minimum rate power. The Section and amendments thereto do not expand the duties and obligations placed upon the carriers by the other sections of the Act, principally Sections 1, 2, 3 and 4. In respect of Section 3(1), this Court has held that neither the Transportation Act, 1920, nor any earlier amendatory legislation has changed the purpose or scope thereof. *Central R. R. of N. J.* v. *United States*, 257 U. S. 247, 260.

3. The Commission itself doubted its authority to remove the alleged undue preference and undue prejudice.

The Commission states in its report (R. 45) that

> "Our power to correct this situation [deprivation of inland mines of their former markets in

> northeastern Ohio and the alleged undue prejudice and undue preference] has been invoked in the present proceeding and should be exercised to the extent of our authority under the law."

The doubt inherent in the statement is not unjustified for (1) if the Commission was contemplating the equalizing of "fortunes, opportunities or abilities" of the inland mines as compared with the river mines, it was powerless so to do, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 47; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445; (2) if, in the absence of a showing that the rate complained of was non-compensatory or so low as to cast a burden on other traffic, the Commission was contemplating the elimination of the alleged undue prejudice and undue preference pursuant to its minimum rate making power, it was powerless so to do, *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 633;[2] see also *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 288; and (3) if the Commission was contemplating the elimination of the alleged undue prejudice and undue preference pursuant to its powers under Section 3(1), it was powerless so to do, since, as we have seen, it could not, by reason of the 77 cent rate's being a reasonable *maximum* rate, afford

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[2]The order in the *Texas Port* case is very much like the order in the instant case. There, the Commission required the elimination of the alleged undue prejudice and undue preference by the establishing of minimum differentials. The order was not in alternative form. The Court said in part:

> "The evidence failed to show that the rates of the Texas & Pacific and the L. R. & N. on export and import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was, therefore, no basis for the order fixing minimum reasonable rates under Section 15(1) of the Act." (289 U. S. 627, 633.)

the carriers an alternative method of eliminating such alleged undue preference and undue prejudice, *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 650.

4. The power exercised by the Commission was that under Section 15(1) to establish a reasonable rate, the removal of the alleged undue preference and undue prejudice being a mere incident thereto.

The only possible theory under which the Commission, under Section 15(1), could require the removal of the alleged undue preference and undue prejudice was that such removal was incidental to the establishment of a reasonable rate. Precedent for such is to be found in this Court's decision in *St. Louis South Western Ry. Co.* v. *United States*, 245 U. S. 136, 144-145, where an unreasonable rate was required to be reduced, with the result that undue prejudice and undue preference complained of was eliminated.[3] The instant case, however, is not that case. As we have shown, the Commission erred in finding that the 77c rate

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[3] "The order here complained of gives the carriers no such option [to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both]. It directs that the rates to Paducah shall be 'not in excess of the rates at present in effect from the same points or groups to Cairo, Ill.'. In other words, the Commission, having found the 22-cent rate unduly high, reduced it to 16 cents, by establishing joint through rates. The injury resulting from discrimination was doubtless the reason which induced the Paducah Board of Trade to institute the proceeding; and the Commission may have considered the existence of the lower rate to Cairo persuasive evidence that the 22-cent rate to Paducah was unreasonably high and the resulting discrimination strong reason for establishing the 16-cent joint rate. But the order is strictly one under § 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of § 3." 245 U. S. 136, 145.

was unreasonable. On the contrary, measured by the usual standards of the Interstate Commerce Act, the 77c rate was not only reasonable but marked the upper limit of the zone of reasonableness. The finding in respect of the reasonableness of the rate under attack being invalid, the finding of undue preference and undue prejudice, likewise, is invalid, since its validity is merely incidental to and dependent upon the validity of the finding in respect of reasonableness.

5. Whether the order be a Section 3 or a Section 15 order, the standards for determining undue preference and undue prejudice are the same, such standards being those required to establish undue preference and undue prejudice under Section 3.

The standards for determining undue preference and undue prejudice under Section 3(1) have not been changed by Section 15(1). *Central R. R. of N. J.* v. *U. S.*, 257 U. S. 247, 260. It appears from the language of Section 15(1) that the undue preference and undue prejudice which the Commission may require to be eliminated as an incident to its power to establish just and reasonable rates is the undue preference and undue prejudice forbidden by Section 3(1). In other words, a determination under Section 15(1) in respect of undue preference or undue prejudice of a rate must be determined by the standards of Section 3(1), although such determination is merely incidental to the determination of a reasonable rate. Applying the standards of Section 3(1) to the Commission's ultimate finding of undue prejudice and undue preference and to so much of its order as is based thereon clearly and conclu-

sively demonstrates that such finding and order are invalid and void.

Judged by the standards of Section 3(1) the 77c ex-river rate is not unduly prejudicial to the inland mines or unduly preferential to the river mines. That is so for the following reasons:

(1) The preference and prejudice, if any, are the result of geographical advantage on the one hand and geographical disadvantage on the other, that is, availability of river transportation to the river mines and non-availability thereof to the inland mines;

(2) The preference and prejudice, if any, are not the result of the voluntary and unlawful act of either the Pennsylvania or the Pittsburgh & Lake Erie;

(3) The preference and prejudice, if any, result from a dissimilarity of circumstances and conditions between persons and localities;

(4) The preference and prejudice, if any, do not result from a difference in rates which "is not justified by the cost of the respective services, by their values, or by other transportation conditions".[4]

(5) The preference and prejudice, if any, cannot have resulted from the 77c ex-river rate, since that rate was prescribed by the Commission as a reasonable maximum rate and, as the record conclusively demonstrates, is not less than a reasonable maximum rate.

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[4] *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 524.

(a) THE PREFERENCE AND PREJUDICE, IF ANY, ARE THE RESULT OF GEOGRAPHICAL ADVANTAGE AND DISADVANTAGE.

The District Court, in sustaining the finding of undue preference and prejudice, stated that there was sufficient evidence to show that the inland mines were being eliminated from competition in northeastern Ohio by the ex-river rate (R. 136). It concluded it was not the geographical advantage of the river companies which resulted in the prejudice and preference but that it was the ex-river rate because "it was only after the 77 cent ex-river rate became effective that the coal began to move" (R. 136). The statement of the court loses sight of the fact that there were no transfer facilities available and no rate at all in effect for more than two years after the Commission decided the *First Ex-River case* and prescribed 77 cents as a reasonable maximum ex-river rate. This is sufficient to explain why the traffic did not move theretofore.

The real fact is that the loss of markets in northeastern Ohio by the inland mines has resulted not from the ex-river rate of 77 cents—which is not only a reasonable rate *per se* but a reasonable *maximum* rate—but, in the very nature of things, from the availability of the river to the river mines with the consequent low cost of the water portion of the river-rail haul. The Commission in its very first report in this entire proceeding pointed out that the costs of river transportation are normally and naturally substantially below the cost of rail transportation (R. 57, 64).

The proposition accepted below, therefore, really is that Section 3 is aimed to prevent competition of water transportation with all-rail transportation and to deprive those in a position to use water transportation of the natural geo-

graphical advantage of their location. This is contrary to the decisions of this Court which have held that Section 3 does not attempt to equalize fortunes, opportunities and abilities (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46), and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference (*Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445). The injustice of applying any other rule to the facts of this case is clear.

The record shows that the geographical advantage of the river mines is an advantage for which they have paid and continue to pay, the cost and value of and the taxes upon river mines being about fifty per cent greater than in respect of inland mines (R. 1034). This difference in values, costs and taxes has been recognized by this Court in the *Green County Case* (*Cumberland Coal Co.* v. *Board*, 284 U. S. 23), where it was held that it constituted a denial of equal protection of the laws to the owner of inland mines to make *ad valorem* tax assessments at a uniform valuation upon coal lands of uniform quantity and quality of coal without taking into consideration the fact that coal lands located upon the Monongahela River were more than twice as valuable as coal lands of the same quality and quantity of coal not so located. That decision was in respect of coal lands located in Greene County, Pennsylvania, where some of the inland mines involved in this suit are located and where is located the river mine acquired by one of the present appellants at large cost. These overheads enter into the cost of the coal to the shipper.

The Commission recognized the existence of the geographical advantage of the river mines. It seemed to have been greatly influenced, however, by the fact that this advantage had been enhanced by government expenditures

in the improvement of the rivers for navigation, such improvements rendering those rivers navigable for the greater portion of the year instead of seasonably, as before (R. 44). for the report states:

> "Whether these advantages should further be enhanced to the detriment of the inland mines by the establishment of ex-river rates so low as to eliminate the inland mines from competition merits careful consideration."

The Commission thus completely missed the point that the only advantage to be derived by the river mines from their geographic location upon a navigable river—an advantage for which, as the record shows, the river mines paid—is the availability of water transportation and that the only advantage thereof is the low cost of such transportation. The question was not whether the Commission should give the river mines a *further* advantage, but was whether the Commission had any authority to deprive the river mines of any of the advantage of their geographical position by fixing a rail rate ex-river in excess of a reasonable maximum rate.

In allowing itself to be influenced by the consideration of the large expenditures the Government had made in developing the rivers and the advantage this gave the river mines, the Commission did not perceive that, while this gave the river mines an advantage in respect of the cost of the transportation of their product, it put them to a disadvantage in respect of the cost of production thereof. Moreover, it ignored completely the evidence of record respecting the differences between river mines and inland mines in respect of costs, values and taxes, above referred to. It seemed to think that, unless it found unreasonable

a rate which it had previously established as a reasonable maximum rate and which, on the basis of the record before it measured by the usual standards of the Interstate Commerce Act, is a reasonable maximum rate, it would be giving the river mines a further advantage. This is clearly fallacious. Neither the navigability of the rivers nor the Government expenditures in respect thereof had or could have had any bearing upon the reasonableness of the ex-river rate from Colona and Conway to Youngstown. As stated, the only advantage of water transportation is its low cost. Every other circumstance is in favor of rail transportation, that is, speed, flexibility, insurance, less handling, less necessity for storing coal, less capital investment by the shipper and consumer of coal, etc. If the all-rail rate and the river-rail rate are on approximately the same level, no coal will move on the river and the Commission so found (R. 78). There is, then, no question of giving the river mines any further advantage over the advantage resulting from the Government's development and maintenance of waterways. The question would be precisely the same if the river had been navigable the year round without such development. It is the availability of the river, that is, the geographical location of, and the geographical advantage to, the river mines, not the quantum of the 77c ex-river rate that causes the preference and prejudice.

(b) THE PREFERENCE AND PREJUDICE, IF ANY, ARE NOT THE RESULT OF THE VOLUNTARY AND WRONGFUL ACT OF THE CARRIERS.

Section 3(1) forbids any common carrier making or giving any undue or unreasonable preference or advantage to any particular person, locality or description of traffic, or subjecting any particular person, locality or description

of traffic to undue or unreasonable prejudice or disadvantage. "What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers." *Central R. R. of N. J.* v. *United States*, 257 U. S., 247, 259. While that language was used in respect of circumstances differing from those here disclosed, it applies to the situation here since the Commission's order holds the carriers responsible for what is not and cannot be the result of their own actions. Under the standards of Section 3, prejudice or preference to be undue in respect of rates or practices must be the result of the voluntary or wrongful act of the carrier or carriers against whose rates or practices complaint has been made. *East Tennessee V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18;[8] *Central of N. J. R. Co.* v. *U. S.*, 257 U. S. 247; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 651.

It is clear from the record herein and obvious from the Commission's report that the alleged undue preference and undue prejudice did not result from the voluntary and unlawful act of the carriers.

As stated above, the preference, if any, resulted from geographical location and from the low cost of transportation via river inherent in and incident to such location. The low charge for river transportation was not fixed by the

[8] "The prohibition of the third section when that section is considered in its proper relation is directed against unjust discrimination or undue preference arising from the *voluntary and wrongful act of the carrier complained of as having given undue preference and does not relate to acts the result of conditions wholly beyond the control* of such carriers." [Emphasis added.] Quoted with approval and followed in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 651.

rail carriers. Nor were such carriers parties thereto. The carriers, therefore, were, and are, not responsible for the preference or prejudice resulting therefrom. Furthermore, in respect of the 77c rate itself, that rate was, in effect, a rate compelled by competition. The history back of the establishment of the 77c rate shows that such rate came into existence as the result of an alternative proposal by the Pennsylvania and the Pittsburgh & Lake Erie to meet the threatened competition of the Lisbon's proposed ex-river rate of from 50c to 75c. A rate established for the purpose of meeting competition is not a rate which comes within the condemnation of Section 3(1). *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 192; *East Tennessee V. & G. Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1; *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627; *Ashland Fire Brick Case,* 22 I. C. C. 115.[6]

(c) DISSIMILARITY OF CIRCUMSTANCES AND CONDITIONS.

The purpose of Section 3(1) is to prevent and prohibit undue preference and prejudice between persons and localities in the same relative situation. (*Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.,* 145 U. S. 263; *Interstate Commerce Commission* v. *Chicago, Great Western Ry. Co.,* 209 U. S. 108.) In view of such purpose, the basis of the Commission's finding in respect of undue preference and undue prejudice must necessarily be that the inland mines and the river mines are competitors in the Youngstown district, and that their competitive situations are substantially similar. Admitting that that may have

[6]See reference to *Ashland Fire Brick Case* which was cited with approval in 289 U. S. 627 at 649, Footnote 37.

been true at one time, it clearly was not the situation at the time of the hearing. Nor is it the situation today.

Even if the competitive situations of the inland mines and the river mines were at one time the same, there is nothing in the law which authorizes or permits the Commission to require that that situation be maintained. In other words, if a change should occur in the competitive situation of two shippers, such change would justify a difference in rates. That is the situation here. Whereas both inland mines and river mines in the Connellsville district were formerly 140 miles via rail from Youngstown, the river mines are now but 40 miles therefrom via rail, the condition of the inland mines in respect of distance having remained unchanged. That being so, the effect of the establishment of the transfer facilities at Conway and Colona, so far as the railroads and any problem of rate-making by the Commission was concerned, was the same as if the tipples of the river mines had been moved to Conway and Colona (R. 1014). In other words, the problem of the Commission was the same as if it had been faced with the necessity of prescribing a reasonable rate for the transportation of coal from mines located at Conway and Colona to Youngstown.

Beyond any question,[1] the Youngstown district, located 40 miles from the Ohio river, was entitled to transportation services, including transfer facilities at transfer points on the Ohio river, in respect of coal which could be tendered to the rail carriers from barges for transportation to Youngstown, and to the establishment of ex-river services at reasonable rates for that service. *United States* v. *New York Central R. Co.* (*Erie Barge Canal Case*), 272 U. S. 457. The same is true in respect of shippers who were in a posi-

[1]The Commission so found in the *Lisbon Cases.*

tion to tender their coal to the carriers at such transfer points. Although entitled to ex-river transportation services, including such transfer facilities, the records shows that neither the Youngstown district nor the river mines were able to secure such services from the carriers until the termination of the *Lisbon* cases and the decision of the Commission in the *First* and *Second Ex-River cases*. The carriers had theretofore refused this ex-river service in the same manner as the transfer service in the *Erie Barge Canal* case had been refused and for the same reason *viz:* the desire to retain the coal traffic on their rails.

The Commission having found that the Youngstown district and the shippers and consumers of ex-river coal were entitled to transportation services on such coal from Ohio river transfer points to Youngstown, and the transfer facilities at such points having been erected, the Commission in this case, in determining the rate applicable to such transportation service, apparently determined that rate for the 40-mile haul by a test of what would permit a competitor 100 miles away to compete in the Youngstown district. A determination resulting from the application of such a test is obviously unauthorized by the Interstate Commerce Act.[8]

(d) THE PREFERENCE AND PREJUDICE, IF ANY, DO NOT RESULT FROM A DIFFERENCE IN RATES WHICH "IS NOT JUSTIFIED BY THE COST OF THE RESPECTIVE SERVICES, BY THEIR VALUES, OR BY OTHER TRANSPORTATION CONDITIONS."

In order to bring a difference in rates within the prohibition of Section 3, this Court holds that "it must be

[8]Compare Commissioner Eastman's dissent in *Ohio* case (R. 1593-1594).

shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions". *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 524. In the instant case the difference in cost of the respective transportation services rendered on ex-river coal on the one hand, and on coal from the inland mines on the other, and of the values of such services, is too patent to require exposition. The ex-river haul is only a 40-mile haul and forms a part of the 140-mile all-rail haul on the same lines of railroad from the inland mines to Youngstown. The difference in transportation conditions and services at the transfer points and therefrom to Youngstown, as contrasted with the conditions and services at the inland mines and therefrom to Youngstown, has already been indicated. The difference in the rates having been fully justified on the record "by the cost of the respective services, by their values, or by other transportation conditions", the preference and prejudice, if any, is not undue.

(e) THE PREFERENCE AND PREJUDICE, IF ANY, CANNOT HAVE RESULTED FROM THE 77c EX-RIVER RATE WHICH WAS ESTABLISHED AS A REASONABLE MAXIMUM RATE AND IS SHOWN BY THIS RECORD TO BE NOT LESS THAN A REASONABLE MAXIMUM RATE.

This is not the ordinary case where under Section 3(1) the Commission may require the removal of undue preference or prejudice resulting from a difference in rates, such rates being within the zone of reasonableness, the undue

preference and prejudice being capable of being removed by an alternative adjustment of those rates within that zone. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524. The difference here is that the rate claimed to result in the undue preference and prejudice is a rate which was prescribed by the Commission as a reasonable *maximum* rate and which on the record is conclusively shown to be not less than a reasonable *maximum* rate. Such a rate cannot possibly be unduly preferential or prejudicial to any shipper.

The Commission is presumed to have observed the law when the rate was prescribed. The record shows that the Commission did have in mind the provisions of Section 3(1) and of Section 15(1) of the Act when the 77c rate was prescribed (R. 78, 80, 209, 210). It undoubtedly did comply with the law and prescribed a rate which, in addition to being a reasonable maximum rate, was a non-preferential and non-prejudicial rate. In the absence of a change in conditions or circumstances between the time of the establishment of that rate and the time of the hearing before the Commission in this *Third Ex-River Case*, it is a presumption of law that that rate continued not only to be a reasonable maximum rate but that it likewise continued to be a non-preferential and non-prejudicial rate. The record shows no such change in conditions or circumstances.

6. The question presented in respect of undue preference and prejudice was, and is, not a question of fact for the determination of the Commission.

The District Court appears to have been of the view that the matter of determining whether there was any

undue preference and prejudice between the river mines and the inland mines was for the Commission. The cases frequently cited in support of that rule merely mean that, where the issue is one of fact, it is for determination by the Commission like any other fact. They do not mean that the Commission has a discretion, not governed by any statutory standard, to determine what is and what is not prohibited by Section 3(1). The determination of the construction of the statute and the prohibitions contained therein is, of course, for the courts. As shown above, the preference of the river mines and the prejudice to the inland mines do not come within the prohibitions of the statute.

7. In any event, the evidence of record is insufficient to support the conclusion of undue preference and prejudice. Similarly, the findings of the Commission are insufficient to support its order in respect of undue preference and prejudice.

(a) THE EVIDENCE.

As is shown elsewhere herein (p. 101, *ante*), there are 350 or more mines in the Pittsburgh and Connellsville Districts of Western Pennsylvania and the Fairmont District of northern West Virginia (R. 1599-1601). In the Western Pennsylvania Districts, 30% of the production is by river mines and 70% by inland mines (R. 29). These mines produce vast quantities of coal, and from these mines coal moves annually in a volume of many millions of tons to destinations in northeastern Ohio, principally to destinations to which ex-river rates apply. (R. 1141, 1165, 1227-1230, 1315-1323, 1391-1392, 1347-1348). Yet from all of

these mines having that vast production and responsible for that immense movement to northeastern Ohio destinations there were but five operators of inland mines who appeared before the Commission in these proceedings and claimed that they were unduly prejudiced because of the maintenance of the ex-river rates. (Andrews, R. 1028; Duffy, R. 1031; Cameron, R. 1059; Jamison, R. 1065; and Donohoe, R. 1067.)

We respectfully invite a reading of the testimony of these witnesses and submit that this Court will not find therein anything other than general declarations of competition and loss of business unsupported by evidentiary facts disclosing particular losses, the amount of tonnage lost and to whom lost. As such, the evidence does not meet even the requirements of the Interstate Commerce Commission in respect of the sufficiency of the proof of loss necessary to sustain a finding of undue prejudice within the meaning of Section 3. In *Barrett* v. *Atchison T. & S. F. Ry. Co.*, 172 I. C. C. 319 at 333-334, the Commission said:

> "While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. They may not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference. The evidence must ordinarily establish that the alleged prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another, and, where different commodities are involved, that there is a competitive relation between them."

and again (p. 332):

> "We cannot base a finding of undue prejudice upon assumptions or probabilities."

The sum and substance of the evidence of the five witnesses for the inland mines are that, since the effective date of the ex-river rates, they had been underbid on coal for delivery at northeastern Ohio destinations, or that contracts had not been renewed when expired, or that competition of river mines shut them out from the markets to which ex-river rates are applicable. The effective date of the ex-river rates was July 16, 1932. In respect of that, it must be remembered that within two weeks thereafter the reduced rates within Ohio went into effect. The latter rates were still in effect at the time of the hearing in this *Third Ex-River Case*. The economic depression, of which this Court will take judicial notice, also had an effect on the coal business during the entire period under discussion. Some of these same witnesses, or other representatives of their districts, testified in the *Ohio* case (R. 1553-55, 1583-84). There, the loss of business was attributed to the Ohio rates, the number of customers lost, the amounts of the losses, the Ohio districts to which the business was lost, together with other pertinent facts, having been given. Here, there were no such evidentiary facts offered. There was no showing how much, if any, of their claimed loss of business was occasioned by the ex-river rates, how much by the reduced Ohio intrastate rates, and how much by the depression.

There is an additional reason for the conclusion that no such adverse effect upon the inland mines in fact resulted. By far the larger part of the production of ex-river coal in Western Pennsylvania is in the Connellsville district

where the coal is essentially high volatile coking coal used in the metallurgical industries. Approximately 80% of the production of such coal is by the so-called captive mines, that is, mines which are owned by the same interest which consumes the coal and which in consequence do not ordinarily sell their coal in the commercial markets (R. 29, 462, 1292A, 1292B). Similarly the consumers of captive coal are not potential customers of the commercial mines, including the inland mines. To the extent, therefore, that the movement of ex-river coal was largely a movement of coal from captive mines—and this was particularly true in respect of coal destined to Youngstown—it follows that that movement could not have adversely affected the inland mines.

The evidence, such as it was, was, and is, clearly insufficient to support the Commission's conclusion in respect of undue preference and prejudice.

(b) THE COMMISSION'S FINDINGS.

The Commission's ultimate finding (R. 46) that any rate less than 90c constitutes undue prejudice against inland mines and undue preference of the river mines is based upon the evidentiary finding (R. 45) that:

> "This competitive relationship [between river and inland mines] should not be overlooked as the record establishes that the present ex-river rates have, in a great measure, deprived the inland mines of their former markets in northeastern Ohio"

and upon various findings or recitals scattered throughout the report as follows:

> "Most of these (river) mines are of the captive class and ship their coal by river to affiliated iron

and steel companies in the Pittsburgh, Steubenville, and Wheeling districts." (R. 29.)

"These (river) mines are principally in the Connellsville district; some are in the Pittsburgh district." (R. 29.)

"Thirty per cent of the production in the western Pennsylvania districts can move originally by barge, the other 70 per cent is restricted to the all-rail routes." (R. 29.)

"Inland coal producers testify to their great disadvantage in selling coal in northeastern Ohio in competition with river mines that use the ex-river rates. Some of these producers have lost their business entirely in this destination territory, and others testify that if the present ex-river rates are continued their competitors having access to the rivers will completely exclude them from the important markets in northeastern Ohio having ex-river rates." (R. 29.)

"Most of the mines in the Pittsburgh, Connellsville and Fairmont districts cannot load coal direct to barges and, therefore, as previously indicated, unduly low ex-river rates affect those mines adversely." (R. 44.)

"One witness, representing the inland mines, testified that his important market for coal is at the destination points under consideration in northeastern Ohio; and that since the ex-river rates took effect he has not received a new contract or the renewal of an old one in that destination territory (R. 44).

"The advantage of the location of the mines on the rivers in this territory have been enhanced by Government expenditures in the improvement of those rivers for navigation. Whether these advantages should further be enhanced to the detriment of the inland mines by the establishment of ex-river

rates so low as to eliminate the inland mines from competition merits careful consideration" (R. 44).

Those findings and recitals, being unsupported by the evidence of record, are entirely insufficient as a basis to support either the ultimate finding of undue prejudice to the inland mines and undue preference to the river mines or the Commission's order. Moreover, of those findings, only the two which refer to the testimony of the witnesses even slightly resemble the kind of findings which are essential to support the ultimate finding and order. As to those two, they do not, within the purview of the *Milwaukee Case*, spell out with the required preciseness the extent of the losses—whether trivial or serious—or in any manner or degree how the preference and prejudice are attributable to the 77c ex-river rate from Conway and Colona to Youngstown.

Respectfully submitted,

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April, 1935.

APPENDIX A

Statutes

The Interstate Commerce Act, as amended, provides in part:

> "§ 1, par. (5) *Just and reasonable charges required; classification of messages, and rates; exchange of service.* All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by wire or wireless subject to the provisions of this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this chapter shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services" (c. 104, 24 Stat. 379, as amended; c. 3591, 34 Stat. 584; c. 309, 36 Stat. 544; c. 91, 41 Stat. 474; U. S. C. Title 49 Sec. 1 (5)).
>
> "§ 3, par. (1) *Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of

traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (c. 104, 24 Stat. 380, as amended; c. 91, 41 Stat. 479, 49 U. S. C. A. § 3 (1)).

"*§ 14, par. (1) Reports of investigations by commission.* Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made" (c. 104, 24 Stat. 384, as amended; c. 382, 25 Stat. 859; c. 3591, 34 Stat. 589; 49 U. S. C. A. § 14 (1)).

"*§ 14, par. (2) Record of reports; copies.* All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of" (c. 104, 24 Stat. 384, as amended; c. 382, 25 Stat. 859; c. 3591, 34 Stat. 589; c. 91, 41 Stat. 484; 49 U. S. C. A. § 14 (2)).

"*§ 15, par. (1) Commission empowered to determine and prescribe rates, classifications, etc.* Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any

individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustily discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed" (c. 104, 24 Stat. 384 as amended; c. 3591, 34 Stat. 589; c. 309, 36 Stat. 551; c. 91, 41 Stat. 484; 49 U. S. C. A. § 15 (1)).

"§ *15, par.* (*7*) *Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the com-

mission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any

hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare or charge sought to be increased after June 18, 1910, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (c. 104, 24 Stat. 384 as amended; c. 309, 36 Stat. 551; c. 91, 41 Stat. 486; c. 510, 44 Stat. 1447; 49 U. S. C. A. § 15 (7)).

"*§ 15a. Fair return for carriers.*

* * * * * * * *

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. (As amended June 16, 1933, c. 91, Title II, § 205, 48 Stat. 220.)"

Section 500 of Transportation Act, 1920, provides in part as follows.

"§ 142. *Development of water transportation; duties of Secretary of War.* It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation" (c. 91, § 500, 41 Stat. 499; 49 U. S. C. A. § 142).

APPENDIX B

Opinion in the Milwaukee Case

SUPREME COURT OF THE UNITED STATES.

No. 379.—October Term, 1934.

United States of America, Interstate Commerce Commission, The Illinois Central Railroad Company, et al., Appellants,

vs.

Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Binkley Mining Company, et al., Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

[March 4, 1935.]

Mr. Justice CARDOZO delivered the opinion of the Court.

On November 22, 1932, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (referred to in this opinion as the Milwaukee) filed with the Interstate Commerce Commission a schedule of rates for the transportation of bituminous coal from mines in Indiana to destinations in northern Illinois. Upon complaint by competing railroads and producers in Illinois, the Interstate Commerce Commission suspended the proposed tariffs and afterwards annulled them. 197 I. C. C. 245; 200 I. C. C. 609. A District Court of three judges has perpetually enjoined the enforcement of the order of the Commission, thereby reinstating the tariffs established by the carrier. 8 Fed. Supp. 970. The case is here upon appeal. Judicial Code, § 210; 28 U. S. C. §47a.

The rates in controversy affect the transportation of coal from groups of mines in Indiana known as the Brazil-Clinton and the Linton-Sullivan origin groups to Rockford and Freeport, Illinois, and certain intermediate points. Up to the effective date of the new schedule the rate to Rockford and Freeport from the Brazil-Clinton group had been $1.87 per ton, and from the Linton-Sullivan group $1.92. The proposed change called for a reduction of 17 cents, with the result that the rates between the points mentioned became $1.70 and $1.75 respectively. Reductions ranging from 4 to 10 cents were proposed for other destinations nearer to the point of origin.

In its transportation of bituminous coal the Milwaukee is in competition with lines in Illinois, Indiana and Western Kentucky. We direct our attention first to the situation in Illinois, confining ourselves to facts that have been found by the Commission. For many years there was a parity of rates between the Springfield group in Illinois and the Brazil-Clinton group in Indiana. There was also a customary differential for Illinois groups farther south than Springfield as well as for other groups in Western Kentucky. For example the rate from Springfield to Rockford was 30 cents less than from mines in southern Illinois. On August 20, 1930, these relations were broken by an order of the Illinois Commerce Commission reducing intrastate rates in Illinois 17 cents a ton. Rates from Springfield to Rockford which had been $1.87 became $1.70; those from southern Illinois, previously $2.17, became $2. Upon the publication of these reductions Milwaukee complained of them to the Interstate Commerce Commission, and asked that they be canceled. 49 U. S. C. § 13. It insisted that the lower schedule would result in undue and unreasonable advantage to persons and localities in intrastate commerce and in undue and unreasonable discrimination against those in interstate commerce. The Commission rendered its decision in March, 1932. It allowed the contested rates to stand in so far as the points of destination were Rockford

and Freeport, though it found discrimination, and ordered an increase of five cents a ton, upon shipments to Chicago. *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537. In respect of the Rockford-Freeport traffic, it held that the intrastate rates might reasonably be higher, but that the like was true of the rates to the same points from the groups in Indiana. 182 I. C. C. 537, at p. 549, 550. "The principal competition of the Illinois producers at these destinations comes from Indiana, and we find no sufficient justification for requiring any of the Illinois rates to these points to be increased until the low rates from Indiana referred to have been placed upon a level more nearly commensurate with the general level of rates in this territory." In brief the ruling was that the Interstate Commerce Commission would keep its hands off until the rates of interstate competitors had been placed upon a sounder basis. It would not stabilize rates at the then prevailing levels when the rate structure as a whole was in need of readjustment and revision. A refusal to interfere with one of the terms of a proportion is very different from an approval of the proportion as a continuing condition. Restraints were not imposed upon the lines in Illinois, but equally they were not imposed upon those in Indiana. The decision was not a mandate to the carriers to preserve undisturbed an existing relation between rates; the decision was a refusal by the Commission to compel an increase of the rates on one side of the relation. Those on the other side were subject to change at the instance of the carriers affected to the same extent as they had been before. The forces of competition were left to do their work.

From the situation in Illinois we turn to that in Indiana and Kentucky. Again we confine ourselves to the report unless testimony is mentioned. Six carriers in addition to Milwaukee are in competition for the carriage of coal from groups in Indiana to points in northern Illinois. These lines are the means of transportation for the product of the coal mines at Princeton and Booneville. They compete also

to a slight extent for the carriage of coal from the Brazil and Linton groups, though the testimony is that their traffic from those points is only 1% or less, as compared with 99% belonging to Milwaukee. For all these Indiana routes, group rates have been maintained for many years as the outcome of agreement among the carriers concerned. Rates from Linton-Sullivan were five cents higher than from Brazil-Clinton, those from Princeton seven cents higher than from Linton-Sullivan, and those from Booneville ten cents higher than from Princeton. If Milwaukee is upheld in the reduction of its own schedule from Brazil and Linton northward, there is likely to be an attempt by other Indiana carriers to make proportionate reductions from points along their lines.

The change of rates in Illinois had repercussions also upon tariffs in Kentucky. As far back as 1927, the Commission fixed a differential of 35 cents in favor of the roads from the western Kentucky mines as compared with those from the mines in southern Illinois. *Illinois-Indiana Coal Cases,* 128 I. C. C. 265; *West Kentucky Coal Bureau* v. *Illinois Central R. Co.,* 172 I. C. C. 279. Upon the lowering of intrastate rates for Illinois carriers, the western Kentucky carriers restored the preëxisting relation between themselves and their Illinois competitors by reducing their own rates to the extent of the established differential. The Commission made an order approving the reduction.

With these changes in the rates in Illinois and Kentucky there remained only the rates from the groups in Indiana that were out of line with the proportion maintained for many years. To restore that proportion Milwaukee filed a new schedule whereby the rates from Brazil-Clinton to Rockford and Freeport, were again placed at a parity with those from Springfield to the same places, the rates from Linton-Sullivan being correspondingly adjusted. This is the schedule that has been disapproved by the Commission. Two reports were filed, one in November, 1933, the other in April, 1934. The first, which came from a division of the Commission, was confirmed by the entire body

upon denying a petition for rehearing. Suit for an injunction was promptly started by the carrier. Two days before the day appointed for the hearing, the Commission of its own motion reopened the proceeding, and thereafter filed a second report, amplifying the first one. Following that report the suit was brought to trial upon supplemental pleadings. The carrier took the position: (1) that the order of the Commission was not supported by the findings; and (2) that irrespective of the findings it was not supported by the evidence. The District Court gave a decree for the complainant upon the second ground without passing upon the first. Upon appeal to this court by the Commission and by intervening railroads, the appellees (the Milwaukee and intervening coal producers) renew the grounds of challenge put forward at the trial.

This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, January 7, 1935, — U. S. —. "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." *Florida* v. *United States*, *supra*. Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning.

The jurisdiction of the Commission to cancel the proposed schedule was invoked by the protesting carriers and producers under two sections of the statute, subdivisions 1 and 7 of § 15 and subdivision 2 of § 15a. Section 15 (subdivisions 1 and 7) is to the effect that the Commission shall have power to determine the just and reasonable rate when a rate in force or proposed is found to be unjust or unreasonably or unduly discriminatory or otherwise unlawful. Section 15a is to the effect that in the exercise of this power to establish just and reasonable rates the Commission shall give due consideration, among other factors, "to the

need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenue sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

The second report of the Commission is a long and discursive narrative. Two paragraphs at the end give the key to its meaning:—

> "We find that the proposed rates, if permitted to become effective, would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenues of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.
>
> "We find that the proposed rates would be unreasonable and in violation of section 1 (5) [which denounces unreasonable charges] and 15a (2) of the act [which has been summarized above]".

The statement in the second of these paragraphs that the proposed rates would be "unreasonable" must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida* v. *United States*, *supra*, at p. 213; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 449. There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is or-

dinarily free to adjust charges for itself. *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 636; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, § 15a. Those tendencies excluded, "a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best." *United States* v. *Illinois Central R. Co., supra.*

Subjected to these tests, the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle. For an answer to that question, other facts, exhibited with greater particularity in other parts of the report, must be brought forward and considered. Those affecting the Indiana groups may conveniently be stated first; those affecting groups in Illinois afterwards.

Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change. The Indiana carriers by long continued coöperation have maintained a fixed schedule of differentials between mines in the southern group (Princeton and Booneville) and mines farther to the north. There is not a fact stated in the report to indicate that it will be unjust or impracticable to apply the new Milwaukee rates to the other lines in Indiana after increasing them by the differentials hitherto prevailing. There

is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage." *Florida* v. *United States, supra,* at p. 214. As applied to the Indiana groups, the broad conclusions of the report, when related to the supporting findings, amount to this and nothing more, that the new schedule for Milwaukee is likely to be followed by new schedules maintaining the same ratio for other lines in Indiana. Even if the outcome for those lines is a diminution of the profits (the return being none the less compensatory), this without more does not make it wrongful for Milwaukee to restore the long standing parity between Brazil and Springfield. At the very least the findings should inform us, if only approximately, of the extent of the expected loss; they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Cf. *Florida* v. *United States,* 292 U. S. 1, 9. Nothing of the kind is shown. The schedules are to congealed as they exist, because if not congealed they will be fluid, fluidity is change, and change has the potency, if not the promise, of disturbance. As to conditions in Indiana, this and hardly more is the teaching of the report.

We pass to the relation between the Indiana groups and those in Illinois. As we have seen, parity of rates had been maintained for many years between Indiana lines transporting coal from Brazil-Clinton to northern Illinois and Illinois lines transporting coal from Springfield. There was no complaint by the Commission during those years that the relation was unfair. There was no holding to that effect when orders of the state commission prescribing lower rates in Illinois were kept in operation against the protest of Milwaukee. *Intrastate Rates on Bituminous Coal between Points in Illinois, supra.* The significance of that decision has been considered already in the course of this opinion.

As we have striven to make clear, the Commission did not rule that the effect of the new rates was to establish a fair relation, still less the only fair one, between Illinois and Indiana, a relation to be maintained as something fixed and constant. The findings then made are repeated by quotation in the report in this proceeding without comment or explanation that would give them another meaning. If the schedule in controversy is to be rejected as oppressive or unreasonable, the grounds for the rejection must be looked for somewhere else than in the earlier decision.

We are warned by the new report, however, that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana, and this in turn to new reductions by lines in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case. The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion.* The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds. If Illinois lines attempt to lower their rates again, a proceeding will be available to maintain a fair relation. If the lines in Kentucky, operating in interstate

*See the last two paragraphs of the first report by Division No. 2, which the second report has readopted and confirmed.

commerce, apply for new reductions, the supervisory power of the Commission will subject them to the rule of reason. But other remedies even more plainly adequate are at hand in case of need. Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly. *Florida* v. *United States*, 292 U. S. 1; *United States* v. *Louisiana*, 290 U. S. 70.

In the light of these considerations it is not the Milwaukee that is subject to the reproach of dealing with the matter piecemeal. All that the Milwaukee has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside. Cf. *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462; *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U. S. 768, 773. The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has put off to an indefinite future the remodeling of the rate structure for all the carriers affected, and which has left this particular carrier helpless in the interval. In brief a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come.

We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment

would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 86; *Florida* v. *United States,* 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

The decree should be affirmed, and it is

So ordered.

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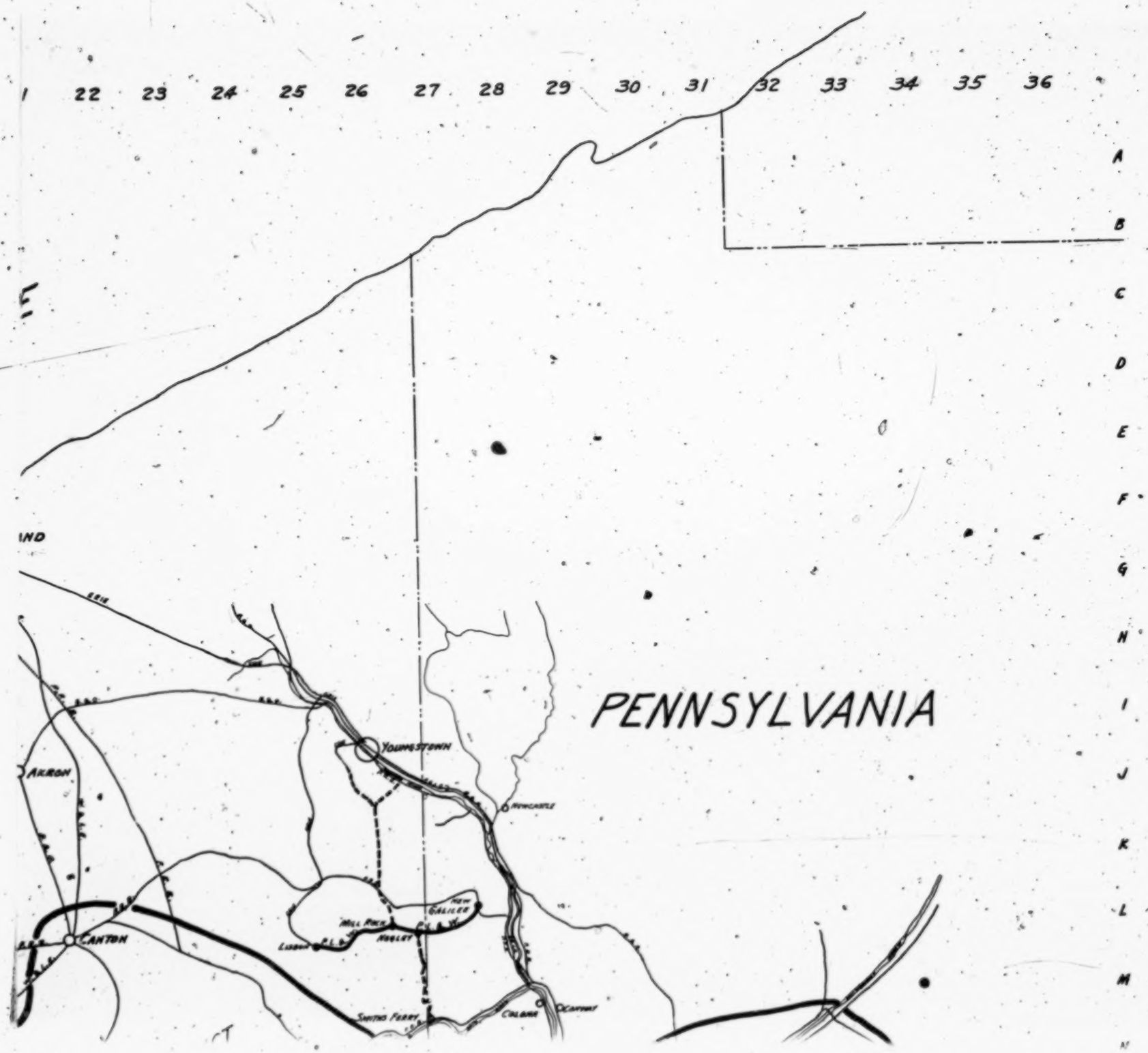

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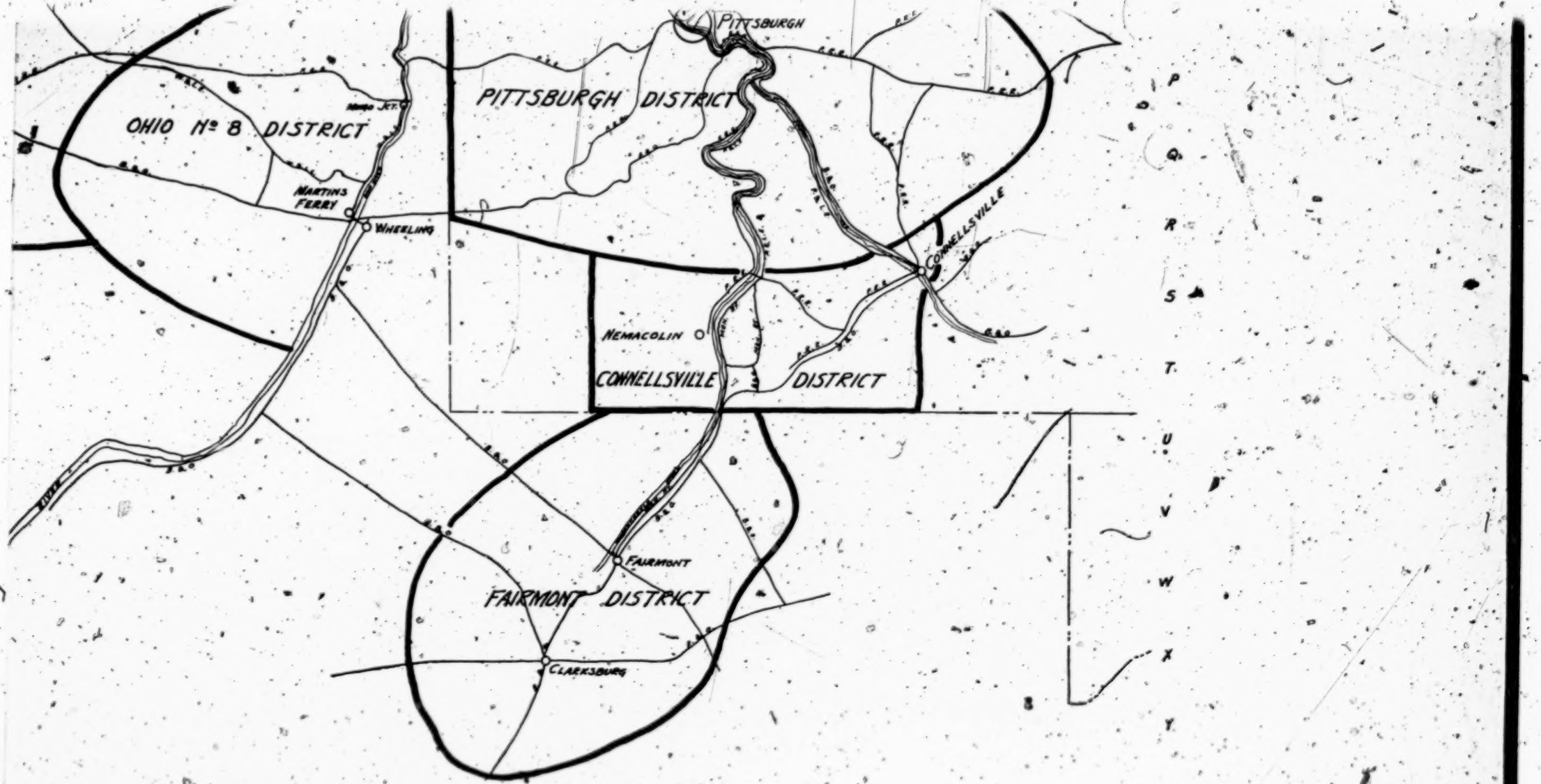

WEST VIRGINIA